85-376

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.....

ETHYL CORPORATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

F. WALTER CONRAD
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1230

MARTIN L. MC GREGOR
NORVELL & ASSOCIATES
6363 Woodway, Suite 275
Houston, Texas 77057
(713) 266-1914

Attorneys for Petitioner

Of Counsel:
DAVID C. BACH
RICHARD M. LAVERS
ETHYL CORPORATION
451 Florida Boulevard
Baton Rouge, Louisiana 70801
(504) 388-7058

QUESTIONS PRESENTED

1. Did the Court of Appeals hold correctly that § 307(b)(2) of the Clean Air Act divests the District Court of Jurisdiction to determine whether a complaint seeking civil penalties under the Clean Air Act states a cause of action?

2. Did the Court of Appeals decide correctly that the challenged regulation was a valid emission standard rather than an invalid "work practice"?

3. Does the Court of Appeals' construction of § 307(b)(2) violate the due process clause of the Fifth Amendment and invade the judiciai independence of Article III Courts?

LIST OF ALL PARTIES

Ethyl Corporation has the following affiliates which are wholly owned subsidiaries except where noted.

(1) American Mayflower Life Insurance Company of New York
(2) Barclay Reinsurance Company (50% by First Colony Life Insurance Company)
(3) Buck Coal, Inc.
(4) Capitol Products Corporation
(5) Eid Corporation
(6) Ethyl Asia Pacific Company
(7) Ethyl Canada Inc.
(8) Ethyl Cooper Limited
(9) Ethyl Export Corporation
(10) Ethyl Foreign Sales Corporation
(11) Ethyl Hellas Chemical Company S.A.
(12) Ethyl Insurance Company
(13) Ethyl Interamerica Corporation
(14) Ethyl Mineralole Oil Additive GmbH
(15) Ethyl Molded Products Company
(16) Ethyl Oil and Gas Corporation
(17) Ethyl Overseas Development Corporation
(18) Ethyl Petroleum Additives, Inc.
(19) Ethyl Petroleum Additives Ltd.
(20) Ethyl Petroleum Corporation
(21) Ethyl Properties, Inc.

(22) Ethyl S.A.
(23) Ethyl VisQueen, Inc.
(24) Fiberlux, Inc.
(25) First Colony Bank and Trust Company
(26) First Colony Credit Company
(27) First Colony Development Company
(28) First Colony Discount Company
(29) First Colony Finance Company
(30) First Colony Leasing Company
(31) First Colony Life Insurance Company
(32) First Colony Mortgage Company
(33) First Colony Properties, Inc.
(34) First Colony Savings & Loan Association
(35) First Colony Underwriting Agencies, Inc.
(36) Floyd County Coal Company, Incorporated
(37) Hardwicke Chemical Company
(38) Hardwicke Export Company
(39) Interamerica Terminals Corporation
(40) Jamestown Life Insurance Company
(41) Joy Corporation
(42) Justine Shipping Corporation
(43) Libby G Corporation
(44) Los Angeles Corporation
(45) Los Angeles Investment Company
(46) Massie Tool & Mold, Inc.
(47) Modern Technical Molding, Inc.
(48) Ram Processing, Inc.
(49) Stork Perforated Products BV (25% by Ethyl Corp.)
(50) The Barclay Group, Inc. (50% by Ethyl Corp.)
(51) The Edwin Cooper Corporation
(52) The Elk Horn Coal Corporation (97% by Ethyl Corp.)
(53) The Elk Horn Corporation
(54) The William L. Bonnell Company, Inc.
(55) Transcontinental Coal Processing, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Ethyl Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 3, 1985.

OPINIONS AND RECORD BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A-1 to A-10) is reported at 761 F.2d 1153. The opinion of the United States District Court for the Middle District of Louisiana (Appendix B-1 to B-11) is reported at 576 F. Supp. 80 (M.D. La. 1983). References in this Petition to "Appendix" are to the five appendices to this Petition (identified as A-E).

JURISDICTION

The Court of Appeals for the Fifth Circuit rendered its decision on June 3, 1985 (Appendix A). This Petition for a Writ of Certiorari has been filed within ninety (90) days of that date within the time prescribed by 28 U.S.C. § 2101(c). The Jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

STATUTE TO BE CONSTRUED

United States Code, Title 42:

§ 7607(b)(2) "Action of the administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." Section 307(b)(2) of the Clean Air Act as added by Pub. L. 91-604, 84 Stat. 1685 (1970).

Related Statutes, Sections 112(c), 113(b), and 307(b)(1) of the Clean Air Act, and regulations, 40 C.F.R. § 61.64(a)(3) and 61.65(a), are included as Appendix E.

SUMMARY OF ESSENTIAL REASONS WHY THIS PETITION SHOULD BE GRANTED

The Court of Appeals for the Fifth Circuit has limited this Court's holding in *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275 (1978) (hereinafter "*Adamo*") to criminal cases. A corporate defendant may, according to the Fifth Circuit's holding herein, be exposed to the identical monetary penalty in a civil suit and be precluded from challenging the validity of a regulation on its face. The Fifth Circuit allows EPA to enforce a facially invalid environmental regulation by labeling the penalty civil instead of criminal. The Fifth Circuit's ruling is not only illogical, it is contrary to the controlling precedent of this Court. It is based on a construction of the statute that

denies this defendant due process and equal protection, and that creates an unconstitutional invasion of the judicial power.

Since environmental regulatory statutes provide both criminal and civil penalties, and a very limited time for challenge, the Fifth Circuit opens the door for unbridled administrative abuse. Of course, such a regulation (the asbestos regulation in *Adamo* for example) might not be enforceable by a criminal prosecution, but the identical monetary penalty could be collected in a civil action by the Fifth Circuit's rule. The result achieved by the Fifth Circuit will, if let stand, contribute to the public's perception of the "Through the Looking Glass" quality in the nation's governance decried by this Court in *Adamo*.[1]

STATEMENT OF FACTS

On February 9, 1983, Ethyl Corporation (hereinafter "Ethyl" was sued by the United States of America "pursuant to Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b) for civil penalties and injunctive relief to abate continuing discharge of vinyl chloride, a hazardous air pollutant, in violation of Section 112 of the Clean Air Act, 42 U.S.C. § 7412."

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[1]See *Adamo Wrecking Company* v. *United States*, 434 U.S. 275 at 283.

> Now, the Administrator has Humpty Dumpty's power to make a regulation an emission standard by mere designation, if he escapes challenge in the first 60 days.
>
> " 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I chose it to mean — neither more nor less.'
>
> " 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
>
> " 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.' "
>
> M. Gardner, "The Annotated Alice, Alice's Adventures in Wonderland, and Through the Looking Glass by Louis Carroll," New American Library; New York, New York, May 1974, at page 269.

The Complaint alleged 98 specific discharges of vinyl chloride from 1977 through 1982 in violation of either the relief valve discharge provision of 40 C.F.R. § 61.65(a) or the manual vent valve discharge provision of 40 C.F.R. § 61.64(a)(3). (Appendix C-5-14.) The allegations were verbatim from the reports required to be submitted by Ethyl and involved many reactors and vessels within the plant.

The regulations in question are portions of the National Emission Standard for Vinyl Chloride promulgated on October 21, 1976 (41 Fed. Reg. 46560, now codified at 40 C.F.R. § 61.60 *et seq.)*. (Appendix C-2, paragraph 9.)

Ethyl moved to dismiss the Complaint pursuant to F.R.C.P. 12(b)(6), contending that when 40 C.F.R. §§ 61.64(a) (3) and 61.65(a) were promulgated the Administrator had no statutory authority to promulgate, design, equipment, or work practice standards as emission standards. (Appendix D-1-2, paragraph 5.)

The District Court found that the regulations were not emission standards, applying the tests set forth by this Court in *Adamo.* The Court entered a final Judgment dismissing the Complaint on July 6, 1983 (Appendix B).

The United States appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit held that *Adamo* was not controlling because that case was a criminal prosecution whereas the case at bar is a suit for "civil penalties" (Appendix A).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Had Ethyl been charged with criminal violations of regulations promulgated under Section 112 of the Clean Air Act, and if the violations were proved beyond a reasonable doubt, a fine

of up to two million, four hundred fifty thousand dollars could have been imposed if all 98 violations were proved. In accordance with *Adamo,* Ethyl could have challenged the regulations as not being emission standards and § 307(b)(2) would not have barred review.

However, according to the Fifth Circuit, the United States may now proceed to sue for a *civil* penalty of two million, four hundred fifty thousand dollars for identical violations. Since the District Court lacks jurisdiction, according to the Fifth Circuit, Ethyl cannot challenge the facial invalidity of the regulation.

Under the Fifth Circuit's approach, but for the statute of limitations, the United States could have sued the Adamo Wrecking Company for a "civil penalty," equal to the sum this Court denied in the prior criminal prosecution, for violation of a regulation that this Court held was invalid. *Stone* v. *United States,* 167 U.S. 178 (1898). The District Court would have been barred by § 307(b)(2) from examining whether the "emission standard" was in fact an "emission standard" and the defendant would not have been able to avoid a trial, despite its previous victory in this Court.

The case at bar not only affects the entire polyvinyl chloride industry[2], it raises fundamental due process, equal protection,

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[2]Ethyl is aware of 17 other enforcement actions involving alleged violations of 40 C.F.R. §61.65(a) and/or 61.64(a)(3). Of these, six have been settled: U.S. v. Air Products & Chemicals, Inc. (W.D. Ky. 1983); U.S. v. Borden, Inc., (D. Mass. 1985); U.S. v. Shell Oil Company (E.D. La. 1985); U.S. v. Conoco, Inc., No. 83-1916-E (W.D. Okla. 1985); U.S. v. Conoco, Inc., No. EC-37-LS-P (N.D. Miss. 1985); U.S. v. Conoco, Inc., No. 83-2518 (W.D. La 1985).

Of the eleven pending cases, nine are located in the Fifth Circuit: U.S. v. B.F. Goodrich, No. C82-1043-P(J) (W.D. Ky. 1983); U.S. v. B.F. Goodrich and Goodyear Tire and Rubber Company, No. 83-1337-B (M.D. La.); U.S. v. B.F. Goodrich, No. C83-0456-L(A) (W.D. Ky.); U.S. v. Borden, Inc., No. 83-982 (M.D. La.); U.S. v. Borden, Inc. and Monochem, Inc., No. 83-744-B (M.D. La.); U.S. v.

and separation of powers issues under the Constitution. The constitutional problems arise because the Fifth Circuit refused to recognize *Adamo* as controlling precedent or to apply the teaching of *Adamo*. The erroneous result stems from attempting to distinguish between the criteria of review in penal actions (whether criminal or civil); failing to apply the definition of "emission standard" established by this Court; construing a judicial review preclusion to deny due process and equal protection; and acquiescing to a Congressional invasion of the judicial province. The Fifth Circuit erred by narrowly construing *Adamo,* failing to test the regulation at issue, and by broadly interpreting "judicial review" to prevent the Defendant from raising a fundamental defense — the facial invalidity of the regulation to be enforced!

THE DECISION BELOW WAS AN OVERLY NARROW CONSTRUCTION OF *ADAMO* WHICH IGNORES THE PENAL NATURE OF THE CIVIL ACTION

The Fifth Circuit held that this Court's decision in *Adamo* does not control the case at bar on the single ground that *Adamo* was a criminal prosecution, whereas the case at bar is a civil action (Appendix A at A-6).

At the outset it should be noted that the decision in *Adamo,* in accordance with sound principles of judicial efficiency, decided the criminal case before the Court. Nothing in *Adamo* precluded application to civil cases.

It is undisputed that the Administrator lacked explicit statutory authority to promulgate equipment, design, work practice, or operational requirements when §§ 61.65(a) and 61.64(a)(3) were issued. The challenge here is to the Administrator's

authority to transmute these regulations into "emission standards" by labeling them. The challenge is one that can be, and was decided by the District Court, on the face of the statute and regulation within the limited review authorized by *Adamo*.

Congressional labeling as a "civil penalty" does not end the Court's duty to determine whether the statute is indeed civil or penal. If penal, *Adamo* clearly controls. As Mr. Justice Warren has observed:

> "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!"

Trop v. *Dulles*, 356 U.S. 86, 94 (1958).

Justice Roberts discussed a penal tax provision as follows:

> [T]he item is variously denominated an occupation tax, an excise tax, and a special tax. If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation regardless of name.

United States v. *Constantine*, 296 U.S. 287, 294 (1935). Accord, *United States* v. *La Franca*, 282 U.S. 568 (1931).

The Fifth Circuit implicitly assumes that a different standard of construction would govern an action for civil penalties. As is shown below, the Fifth Circuit's conclusion does not follow from its premise. Ethyl does not claim that Congress may not authorize collection of a penalty in a civil action, *Hepner* v. *United States*, 213 U.S. 103 (1909), or that a civil defendant is afforded as many constitutional safeguards as are available to criminal defendants, *Helvering* v. *Mitchell*, 303 U.S. 391 (1938). However, an action for civil penalties is governed by stricter standards than a civil damage suit between private parties. The defendant is confronted with the full power of the government just as in a criminal prosecution. The defendant is

entitled to certain fundamental constitutional protections beyond those applicable in a civil damage action. Where a penal intent is present, fundamental constitutional guarantees attach. *Lees* v. *United States*, 150 U.S. 476, 480 (1893).

Due process, even in a civil penalty suit, includes trial before a court with unfettered jurisdiction to determine whether the statute or regulation to be enforced is valid on its face. As to facial validity, there is no constitutionally different standard whether the penal action be civil or criminal. This Court recently considered a facial validity challenge to an ordinance which "imposes only civil penalties" because of the penal purpose of the ordinance. *Village of Hoffman Est.* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). A challenge to the facial validity of a deportation order has been conducted "[d]espite the fact that this is not a criminal statute." *Jorden* v. *De George*, 341 U.S. 223, 231 (1951). *See also*, *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954). Numerous decisions of this Court involving facial challenges to non-criminal statutes under the vagueness standard are collected at 40 L. Ed. 2d 823.

Even in purely civil cases, the congressional denial of a challenge to facial validity has been said to be beyond constitutional limitations. In a concurring opinion in *Bowles* v. *Willingham*, 321 U.S. 503, 525-26 (1944). Mr. Justice Rutledge said:

> [T]his leaves the question whether Congress also can confer the equity jurisdiction to decree enforcement and at the same time deprive the Court of power to consider the validity of the law or regulation and to govern its decree accordingly.
>
> Different considerations, in part, determine this question from those controlling when enforcement is by criminal sanction. The constitutional limitations specially applicable to criminal trials fall to the side. Those proceedings, including whatever matters affecting discrimination are applicable under the Fifth Amendment, and to the

> independence of the judicial power under Article III, in relation to civil proceedings remain applicable.
>
> All this is pertinent to whether Congress, in providing civil enforcement of the Act and the regulations, can do what in my opinion it cannot require by way of criminal enforcement of this statute, namely by providing the single opportunity to challenge the validity of the regulation and making this available for the limited period of time, constitute the method afforded the exclusive mode for securing decision of that question and, either by virtue of the taking advantage of it or by virtue of the failure to do so within the time allowed, foreclose further opportunity for considering it.
>
> In my opinion Congress can do this, subject however to the following limitations or reservations, which I think should be stated explicity; (1) The order or regulation must not be invalid on its face; ....

id. at 525-26. The matter in *Bowles,* was price regulation (order establishing maximum rents in certain areas during World War II, justified by the war powers), but a challenge to the regulation on its face was not to be precluded. The distinction drawn by the Fifth Circuit is inapplicable even in a purely civil case. In fact, the majority opinions in both *Bowles, supra*, and *Yakus* v. *United States*, 321 U.S. 414 (1944), commented that no challenge was raised to the facial validity of the regulations, with the implication that a different result would have been required if such challenge were barred.

It has never been suggested that the Clean Air Act permits *both* criminal and civil penalties to be collected for the same emission. The penal intent of § 113(b) bars such a result. "[A]n acquittal is not a bar to subsequent civil action arising out of the same facts on which the criminal proceeding was based..." *Stone* v. *United States, supra.* "But, where the subsequent proceeding is to punish, the first action is a bar." *Murphy* v. *United States*, 272 U.S. 630, 632 (1926). The penal

intent also bars the Fifth Circuit's distinction of *Adamo*. Whether Ethyl is punished civilly or rudely, the elements of the cause of action do not change, nor does the District Court's power to review the facial validity of a regulation brought before it for enforcement.

The Fifth Circuit's holding also conflicts with the analysis of the Third Circuit in *Hooker Chemical Co.* v. *EPA*, 642 F.2d 48 (3rd Cir. 1981). The Court noted in holding the issue moot:

> Hooker invokes *Adamo Wrecking, supra*, in challenging the employment of § 61.65(a) to support a § 113(a) emission standard violation. Because the § 113 order has been withdrawn, and Hooker would be able to raise the alleged infirmity as a defense in enforcement proceedings, we would be rendering an advisory opinion to consider the matter on the merits at this stage.

Id. at 53, n.3. As in the case at bar, Hooker would have faced civil penalties if the enforcement action had been pursued. The Third Circuit clearly recognized that *Adamo* was controlling in a civil penalty suit.

THE REGULATIONS AT ISSUE ARE NOT EMISSION STANDARDS AS DEFINED BY THE ADAMO COURT

The Fifth Circuit held that "we have no trouble labeling the regulations as emission rather than work practice standards since each sets a 'no discharge' cap on the amount of vinyl chloride and polyvinyl chloride that can be emitted." [See Appendix A-9]. In so holding the Fifth Circuit was clearly in error. The regulations at issue do not establish any quantitative limit on emissions. The regulations only prohibit preventable emissions. The test of preventability is obviously a qualitative, not a quantitative, standard. For example, emission incidents in the Complaint range from about 20 lbs. [Appendix C-10] to approximately 13,200 lbs. [Appendix

C-12]. At trial it is possible that the trier of fact could find a 20 lb. incident was "preventable" and thus a violation but the 13,200 lb. event was not. The quantity vented is not determinitive of anything.

In *Adamo*, the defendant had only two choices. It could have zero emissions or it could comply with the work practices required by the regulations. The vinyl chloride standard gives Ethyl the same two choices. Ethyl may have zero emissions or Ethyl may comply with the detailed instructions set out by EPA in 40 Fed. Reg. 59539. If any emission does occur, the Trial Court will not determine whether Ethyl has violated the regulation by any quantifiable test, but by determining if such a discharge was "avoidable." Whether the discharge was avoidable depends, as EPA admits, on whether Ethyl has complied with the preventive measures required by EPA to prevent "avoidable" discharges. These preventive measures, listed in the Preamble of the proposed regulations are long and detailed:

> A zero emission limit is being proposed for relief discharges which can be prevented. In most cases, such discharges from reactors can be prevented by measures including, but not limited to, properly instrumenting the reactors to detect upset conditions, injecting chemicals to stop the polymerization reaction during upset conditions, venting the reactor contents to a gasholder during upset conditions and ultimately to a recovery system, providing employees with improved training on preventing and handling upset condition, and utilizing a stand-by source of power. For other pieces of equipment, increasing pressure due to inert gases in the system can be relieved by manual venting to a gasholder or recovery system. The conditions which lead to discharges can also be prevented in most cases by proper handling and transfer of vinyl chloride or materials containing vinyl chloride. Discharges which cannot be avoided by taking such preventive measures, such as those caused by natural disaster, will not be in violation of the proposed standard if the owner or operator

> notifies EPA within 10 days concerning the nature and cause of the discharge. This notification provision is necessary to permit EPA to investigate the surrounding conditions and determine whether the discharge could have been prevented.

40 Fed. Reg. 59539. As the preceding shows, EPA's determination of whether a source has violated this regulation will be based not on whether a specific quantity was emitted but on whether the source has implemented the recommended measures required by EPA or taken equivalent steps to prevent emissions.

Ethyl agrees that, if the regulation simply read "there shall be no discharge to the atmosphere", the regulation would impose a quantitative limitation and would be an emission standard. Had the regulation been so worded, its effect easily could have been ascertained by the industry, and appropriate judicial review could have been obtained. However, the regulation on its face is not a "no discharge" limitation. The regulation only forbids discharges which are not an emergency relief discharge. The regulation further defines an emergency relief discharge as "a discharge which could not have been avoided by taking measures to prevent the discharge". Thus, the fact that an emission occurred on a particular date does not end the inquiry, as it would if the limitation were truly zero.

The Fifth Circuit ignored the District Court's analysis that the issue at trial will be preventability of the discharge. The government's allegations of emissions are verbatim from Ethyl's emergency discharge reports required by the rules. The Fifth Circuit assertion that the regulation contains a "no discharge" limitation ignores the facts that must be proven in an enforcement proceeding. The practical guide to whether the regulations are "emission standards" is the test applied by the District Court. If the regulations were emission standards, violation would be established by the fact that an emission in

excess of a proscribed level had occurred. Plant design, equipment, work practices, and operations would be irrelevant except perhaps in mitigation. In contrast, the fact that an emission occurred is not dispositive, the central issue to be tried is preventability of the emission. The Biblical test — "by their fruits ye shall know them" — is the only reliable guide to determining whether the so-called "emission standard" is in fact an "emission standard."

THE DECISION BELOW IS AN OVERLY LITERAL INTERPRETATION OF SECTION 307(b)(2) AND IMPROPERLY RESTRICTS "JUDICIAL REVIEW"

The Fifth Circuit errs by giving an overly literal interpretation to Section 307(b)(2).[3] The Fifth Circuit apparently reasons that Congress intended a regulation promulgated without statutory authority (facially invalid), to be validated by Section 307(b)(2) if not challenged within 60 days.

In his concurring *Adamo* opinion, Mr. Justice Powell specifically commented on the constitutional infirmity of Section 307(b)(2), which would have occurred had the majority held that a Court could be required to enforce a void regulation, enacted in excess of the statutory authority, merely because such regulation had not been timely challenged when promulgated: "As important as environmental concerns are to the country, they are not comparable — in terms of emergency justifying the short cutting of normal due process rights — to the need for national mobilization in wartime of economic as well as military activity." *Adamo* at 290. The non-emergency nature of this litigation is perhaps best illustrated by the government's six year delay in bringing this civil suit.

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[3] "Taking phrases literally instead of as they are commonly understood is characteristic of the creatures behind the looking glass, and basis for much of Carroll's humor."

"The Annotated Alice," *supra*, at 280, note 5.

Nor was Mr. Justice Powell's concern transitory — it was reaffirmed in *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 594 (1980). There Justice Powell noted that the constitutional difficulties "well may counsel a narrow construction of § 307(b)(1), cf. *Chrysler Corp.* v. *EPA*, 195 U.S. App. D.C. 90, 98-100, 600 F.2d 904, 912-14 (1979) (parallel provisions of Noise Control Act)...". The due process clause limits the power of Congress to restrict access to the Courts. Had the Fifth Circuit recognized that Congress cannot bar judicial review to the point of denying due process, it would have reached the opposite result.

Apparently, the Fifth Circuit recognizes that its interpretation offends traditional notions of due process and would undercut the constitutionality of Section 307(b)(2), noting Justice Powell's concern in *Adamo*. To escape from this dilemma, the Fifth Circuit simply asserts that the Defendants at bar have no standing to complain of the due process deprivation since they participated in the administrative proceedings giving rise to the challenged regulations (see Appendix A-8, note 8). While the Fifth Circuit attempts to avoid one due process problem — notice and opportunity to be heard — it creates a more fundamental due process issue — equal application of the law. Such reasoning is obviously fallacious. As Justice Frankfurter said:

> [I]t is not lightly to be presumed that Congress sought to infringe on 'very sacred rights'.
>
> * * *
>
> [I]t is not to be assumed as a matter of course that when Congress adopts a new scheme for Federal Industrial Regulation, it deals with all situations falling within the general mischief which gave rise to the legislation. The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and

> habits, cut across what might otherwise be the implied range of legislation.

Frankfurter, *"Some Reflections on the Reading of Statutes"*, 47 Columbia L. Rev. 527, 539-40 (1947).

Here the Fifth Circuit has concluded that a regulation, void on its face, may be constitutionally enforced in a civil suit and, presumably, a criminal action, against any corporation that participated in the administrative process, though perhaps not against those having no adequate notice. To make such a distinction denies these defendants equality before the law and, thus, due process in its most fundamental sense. A Court may not apply a statutory construction which imputes to Congress the intention to deny due process nor can a Court justify such an aberrant interpretation on the ground that the defendants at bar, having participated in the administrative proceedings, lack standing to raise a due process challenge.

The Fifth Circuit's attempt to avoid the due process issue has been at the expense of equal protection before the Courts. Although the Fifth Amendment lacks the explicit command for equal protection found in the Fourteenth Amendment, this Court has held that due process also forbids discrimination, *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). A discriminatory application of statutory construction cannot be permitted, based on prior exercise of constitutionally protected rights.

The Fifth Circuit also ignores the inherent general jurisdiction of the District Court and its traditional duty to refuse to enforce statutes or regulations which are invalid on their face. Thus, the Fifth Circuit approves a Congressional invasion of the judicial province offensive to the traditional separation of powers established by the Constitution. The United States, having invoked the jurisdiction of the District Court, now claims that that very Court lacks jurisdiction to examine the government's pleading and determine whether a cause of action is set forth therein. The Court's duty to interpret the laws

is fundamental and is long settled, *Marbury v. Madison*, 5 U.S. 137 (1803).

The Fifth Circuit could have avoided the constitutional due process, equal protection and separation of powers issues by interpreting the sweeping language of Congress in a way that is consistent with Congress' limited power to preclude judicial review.[4] Had the Court recognized that Section 307 cannot

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[4] In his dialectic discussion, Professor Hart makes the following comments on the issue before the Court:

> "Q. Let's stop beating around the bush and get to the central question. The bald truth is this, isn't it, that the power to regulate jurisdiction is actually a power to regulate rights — rights to judicial process, whatever those are, and substantive rights generally? Why, that *must* be so. What can a court do if Congress says it has no jurisdiction, or only restricted jurisdiction? It's helpless — helpless even to consider the validity of the limitation, let alone do anything about it if its invalid.
>
> "A. Why, what monstrous illogic! To build a mere power to regulate jurisdiction into a power to effect rights having nothing to do with jurisdiction! And into a power to do it in contradiction to all the other terms of the very document which confers the power to regulate jurisdiction!
>
> "Q. Will you please explain what's wrong with the logic?
>
> "A. What's wrong, for one thing, is that it violates a necessary postulate of constitutional government — that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained.
>
> "Q. Whose Constitution are you talking about — Utopia's or ours?
>
> "A. Ours. It's a perfectly good Constitution if we know how to interpret it.
>
> "Q. Have you got the patience to spell out just what my fallacies are?
>
> "A. There are so many of them it will take a little time. Let's start with the most obvious one. Your point, at best can apply only to plaintiffs. Perhaps a plaintiff *does* have to take what Congress gives him or doesn't give him, although I have my

preclude facial review, the invasion of judicial power would have been avoided. This Court has long held that review as to matters of law must be available. The early railroad rate cases make clear that:

> "[A] statute like the one here involved (under which [civil] penalties of $5,000 a day could be imposed for violating orders of the commission) would be void if access to the courts to test the constitutional validity of the requirement was denied . . . ."

Wadley Southern R.R. Co. v. *Georgia*, 235 U.S. 651, 666 (1915). The Court's duty to avoid a constitutionally invalid construction of a statute is well established.

The applicability of a limited construction to Section 307 was noted soon after its first judicial interpretation. In commenting on the Third Circuit's strict construction of Section 307 (b)(1) in *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3rd Cir. 1972), the commentator finds that problems of constitutional dimension are avoidable under precedents of this Court.

> "The review sections of the Clean Air Amendments and FWPCA simply provide that issues not reviewed in accordance with their procedures 'shall not be subject to judicial review in civil or criminal proceedings for enforcement.'

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doubts about it. But surely not a defendant. Its only a *limitation* on what a court can do once it has jurisdiction, not a denial of jurisdiction, that can hurt a defendant. And if the court thinks the limitation invalid, it's always in a position to say so, and either to ignore it or let the defendant go free. *Crowell* v. *Benson* and the *Yakus* case make that clear, don't they?

"Q. You're saying, then, that the power to regulate jurisdiction is subject in part to the other provisions of the Constitution?

"A. No. It's subject in whole not in part . . ."

Hart, *"The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,"* 66 Harvard L. Rev. 1362, 1373 (1953) (footnotes omitted).

> The courts have interpreted similar language in other statutes as not precluding review of *all* issues or under *all* circumstances. For example, statutory provisions declaring that certain administrative determinations 'shall not be reviewed or redetermined by any court' have been reduced to merely a prohibition against review of very limited findings of fact. [*United States* v. *California Eastern Line Inc.*, 348 U.S. 351 (1955).] Although statutes have often provided that the decision of the Administrator or Secretary 'shall be final', the courts have ordinarily interpreted 'final' as not meaning final for purposes of judicial review and have granted review. [*See Oesterich* v. *Selective Serv. Sys., Local Bd. No. 11*, 393 U.S. 233 (1968); *Estep* v. *United States*, 327 U.S. 114 (1946). *See also Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955).] Similarly, the courts have upheld limitations on review except for questions of 'interpretation and constitutionality' [*see Ludeke* v. *Watkins*, 335 U.S. 160 (1948); *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Bd.*, 195 F.2d 198 (D.C. Cir. 1946).], or unless the action was beyond the agency's jurisdiction [*see Washington Terminal Co.* v. *Boswell*, 124 F.2d 235 (D.C. Cir. 1941), *aff'd*, 319 U.S. 732 (1942)], or except for enforcement of due process requirements. [*See Heikkila* v. *Barber*, 345 U.S. 229, 236 (1943).]"

Project, "*Reviewability: Statutory Limitations on the Availability of Judicial Review*," 1973 Duke Law J. 253, 272.

As Mr. Justice Rutledge pointed out in his *Yakus* dissent:

> [W]henever the judicial power is called into play, it is responsible directly to fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials.

Yakus v. *United States*, 321 U.S. 414, 468 (1944).

Justice Rutledge continues, finding the idea "is entirely novel that regulations have greater immunity to judicial scrutiny than statutes have." *Id.* He also notes that "Congress could not require judicial enforcement of an unconstitutional statute. The same is true of an unconstitutional regulation." *Id.* at 469. Further, "[t]he Constitution does not make judicial observance or enforcement of its basic guaranties depend on whether their violation appears from the face of legislation or only from its application to proven facts. *Snowden* v. *Hughes*, 321 U.S. 1; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-54." *Id.* at 484. Section 307(b)(2) must be construed to recognize the inherent limitations on the power of Congress to invade the judicial province of an Article III Court. This Court recognized the inherent limits of Congress' power to restrict judicial review by its holding in *Adamo.* The Fifth Circuit now seeks to distinguish the inherent due process limitation on the power of Congress when the government seeks to collect a fine through a criminal process from the inherent due process limitations when the government seeks to receive the same money as a "civil penalty".[5]

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[5] "Whatever temptation the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration." Frankfurter, *"Reflections on the Reading of Statutes,"* 47 Columbia L.R. 527-33 (1947).

PRAYER

The Court is respectfully requested to grant the petition herein, reverse the decision of the Fifth Circuit, and dismiss the government's complaint.

Respectfully submitted,

By .....
F. WALTER CONRAD
Attorney of Record
for Petitioner

By .....
MARTIN L. MC GREGOR
Attorney for Petitioner

Of Counsel
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1230

NORVELL & ASSOCIATES
6363 Woodway, Suite 275
Houston, Texas 77057
(713) 266-1914

DAVID C. BACH
RICHARD M. LAVERS
ETHYL CORPORATION
451 Florida Boulevard
Baton Rouge, Louisiana 70821
(504) 388-8011

PROOF OF SERVICE

I certify that a copy of this Petition for Writ of *Certiorari* was hand-delivered to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this 30th day of August, 1985.

.....
MARTIN L. MC GREGOR

APPENDIX A

United States v. Ethyl Corp.
Cite as 761 F.2d 1153 (1985)

United States of America,
Plaintiff-Appellant,

v.

Ethyl Corporation,
Defendant-Appellee.

United States of America,
Plaintiff-Appellant,

v.

Occidental Chemical Corporation and Firestone Tire and Rubber Co., Defendants-Appellees.

Nos. 83-3537, 83-3656.

United States Court of Appeals,
Fifth Circuit.

June 3, 1985.

The United States Environmental Protection Agency instituted civil enforcement proceedings in Federal District Court against two companies seeking damages and injunctive relief on claim that companies had exceeded allowable emission levels of vinyl chloride and polyvinyl chloride under manual vent valve and relief valve regulations promulgated under the Clean Air Act. The United States District Court for the Middle District of Louisiana, John V. Parker, Chief Judge, 576 F.Supp. 80, entered an order dismissing complaints for failure

> 207, 216 (5th Cir.1984). The *Accord* rule does not appear to be a matter of substantive law—a rule of law that would cause "the character or result of [the] litigation materially to differ because the suit had been brought in a federal court." *Hanna v. Plumer,* 380 U.S. 460, 467, 85 S.Ct. 1136, 1141, 14 L.Ed.2d 8, (1965).

> In federal practice, the trial judge has wide discretion in formulating the charge provided that the instructions show no tendency to confuse or mislead the jury with respect to the applicable principles of law. *Rohner, Gehrig & Co. v. Capital City Bank,* 655 F.2d 571, 580 (5th Cir.1981). Since Petty admits that the instruction correctly sets forth the definition of a product defect under Texas law, his claim of error is meritless.

to state a claim upon finding that regulations had been promulgated in excess of the EPA's authority under the Clean Air Act. An appeal was taken. The Court of Appeals, Goldberg, Circuit Judge, held that District Court lacked subject-matter jurisdiction to consider substantive validity of regulations.

Reversed and remanded.

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District Court had no subject-matter jurisdiction, in civil enforcement proceedings brought by the United States Environmental Protection Agency against two companies on claim that companies had exceeded the allowable emission levels of vinyl chloride and polyvinyl chloride under manual vent valve and relief valve regulations promulgated under the Clean Air Act, to consider substantive validity of regulations. The Clean Air Act, §§ 112, 307(b), as amended, 42 U.S.C.A. §§ 7412, 7607(b).

Stanford O. Bardwell, Jr., U.S. Atty., Baton Rouge, La., Anne S. Almy, Robert L. Klarquist, Appellate Section, Ruth McQuade, Environmental Enforcement Section, Land & Nat. Resources Div., U.S. Dept. of Justice, Washington, D.C., R. Gordon Kean, Baton Rouge, La., for plaintiff-appellant.

Richard Marshall Lavers, Baton Rouge, La., Baker & Botts, F. Walter Conrad, Jr., Martin L. McGregor, Houston, Tex., for Ethyl Corp.

Stephen S. Livingston, Carolyn M. Brown, Dallas, Tex., Horace C. Lane, Baton Rouge, La., for Occidental Chemical.

Gary H. Baise, Robert Brager, Washington, D.C., for Firestone.

Appeals from the United States District Court for the Middle District of Louisiana.

Before CLARK, Chief Judge, GOLDBERG and RUBIN, Circuit Judges.

GOLDBERG, Circuit Judge:

The United States Environmental Protection Agency ("EPA") instituted these two consolidated civil enforcement proceedings in federal district court, one against appellee Ethyl Corporation, the other against appellees Occidental Chemical Corporation and Firestone Tire and Rubber Company. The EPA sought damages and injunctive relief, claiming that the companies had exceeded the allowable emission levels of vinyl chloride and polyvinyl chloride under the manual vent valve and relief valve regulations published at 40 C.F.R. §§ 61.64(a)(3), 61.65(a) (1984).[1] The district court ruled that the regulations had been promulgated in excess of the EPA's authority under the Clean Air Act ("Act") § 112, 42 U.S.C., § 7412 (1982), and therefore dismissed the complaints for failure to state a claim under Fed.R.Civ.P. 12(b)(6). Because the district court lacked subject matter jurisdiction to consider the substantive validity of the regulations, we reverse.

In 1970, Congress amended the Clean Air Act to authorize the Administrator of the EPA to promulgate national "emission standards" for hazardous air pollutants.[2] Pub.L. No 91-604,

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[1] The language of § 61.64(a)(3) and § 61.65(a) is identical except as to the substance being discharged ("polyvinyl chloride" versus "vinyl chloride") and the type of valve involved ("manual vent valve" versus "relief valve"). The latter provision states in pertinent part:

> (a) *Relief valve discharge.* Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge.

40 C.F.R. § 61.65(a).

[2] As defined in the 1970 amendments, "[t]he term 'hazardous air pollutant' means an air pollutant to which no ambient air quality

§ 112(b)(1)(B), 84 Stat. 1685 (1970) (codified as amended at 42 U.S.C § 7412(b)(1)(B) (1982)). Section 112 directed the Administrator to publish a list of hazardous air pollutants and to prescribe for each an emission standard affording an ample margin for safety. 42 U.S.C. § 7412(b)(1)(A), (B). Emission standards limit the amount of hazardous air pollutants that can be discharged into the environment. Unlike "work practice standards," emission standards do not tell companies how to discharge—they only say how much. Under the 1970 amendments, the EPA was permitted to promulgate only emission standards, not work practice standards.[3]

As with most congressional delegations of lawmaking by rule, the Act left it to the Administrator to pour content into these relatively broad concepts. The statute was and is clear about one thing, however: an emission standard is subject to judicial review only in the United States Court of Appeals for the District of Columbia, and only if the petition for review is filed within sixty

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standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality" or serious disease. Pub.L., No. 91-604, § 112, 84 Stat. 1685 (1970). While the 1977 Clean Air Act Amendments altered that definition, *see* 42 U.S.C. § 7412(a)(1), vinyl chloride and polyvinyl chloride were listed as hazardous air pollutants at the time of appellants' alleged violations between 1977 and 1982, 40 Fed.Reg. 59,477 (1975), and they remain listed as such, 41 Fed.Reg. 46,564 (1977) (codified at 40 C.F.R. § 61.60 (1984)).

[3] In 1977, Congress amended section 112 to authorize the Administrator to dictate the "how" as well as the "how much." The new section 112 authorizes the promulgation of work practice standards where it is "not feasible" to prescribe numerical emissions limitations either because the hazardous pollutant cannot be emitted through a conveyance or cannot be measured. Pub.L. No. 95-95, § 112(c)(1), (2), 92 Stat. 791 (1977) (codified at 42 U.S.C. § 7412 (e)(1), (2)). While the Administrator can now promulgate a "design, equipment, work practice or operational standard" as well as an emission standard, work practice standards promulgated prior to the effective date of the 1977 amendments are invalid for being in excess of the Administrator's authority under the Act. *PPG Indus. v. Harrison, 660 F.2d 628, 636* (5th Cir.1981).

days of the Administrator's action.[4] *Id.* § 7607(b)(1). Given this limited forum for judicial relief, the statute further contains a preclusive review provision, which states that any "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." *Id.* § 7607(b)(2). In the present case, the Administrator's "action" occurred on October 20, 1976, when the vinyl and polyvinyl chloride regulations were promulgated. *See* 41 Fed.Reg. 46,564 (1976).[5] Appellees, however, did not challenge the substantive validity of the regulations until 1983, when they filed their motions to dismiss in the present enforcement actions. At least on its face, then, section 307(b) divested the district court of jurisdiction to pass on the substantive validity of these regulations over five years after they should have been contested, if at all. *Luckie v. EPA,* 752 F.2d 454, 456-57 (9th Cir.1985); *United States v. Borden, Inc.,* 572 F.Supp. 684, 690-91 (D.Mass.1983); *see Lubrizol Corp. v. Train,* 547 F.2d 310, 311-19 (6th Cir.1976).

Our inquiry might have ended here were it not for the Supreme Court's decision in *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 98 S.Ct. 566, 54 L.Ed.2d 638 (1978). In *Adamo Wrecking,* the Court held that, despite the clear language of section 307(b), a criminal defendant charged with violating an EPA emission standard under section 113(c) of the Act, 42 U.S.C. § 7413(c)(1)(C), could challenge the Administrator's designation of the regulation as an emission standard. 434 U.S. at 284-85. Seizing this opening for judicial review, the court below ruled that the vinyl and polyvinyl regulations are emission stan-

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[4] Prior to the 1977 amendments, this time period was 30 days. *See* Pub.L. No. 91-604, § 307(b)(1), 84 Stat. 1676 (1970) (current version at 42 U.S.C. § 7607(b)(1) (1982)).

[5] Although the Administrator has recommended revising the vinyl chloride regulations, *see* 50 Fed.Reg. 1182 (1985) (to be codified at 40 C.F.R. pt. 61) (proposed Jan. 9, 1985), the proposed regulations, if adopted, would not effect these enforcement actions. *See, e.g., National Indep. Coal Operators' Ass'n v. Kleppe,* 423 U.S. 388, 393 n. 4, 96 S.Ct. 809, 812 n. 4, 46 L.Ed.2d 580 (1976); *First Nat'l Bank of Lamarque v. Smith,* 610 F.2d 1258, 1262-63 (5th Cir.1980).

dards in name only. 576 F.Supp. 80, 86 (M.D.La.1983). In the district court's view, the regulations, rather than merely prescribing a numerical limit for relief valve discharges of vinyl chloride, instead required compliance with specific work practices. The court reasoned that, since the determination of whether a discharge "could not have been avoided" turned on the companies' compliance or noncompliance with certain work practices, the regulation could not fairly be termed an emission standard solely by virtue of its "no discharge" requirement. Since the agency lacked authority to promulgate work practice standards at the time these regulations were promulgated,[6] the district court held the regulations to be invalid and hence dismissed the complaints.

Adamo Wrecking, however, does not control this case. To the contrary, the Court rested its holding in *Adamo* on the nature of a criminal prosecution and the attendant unfairness that would result from disallowing a district court to assess the validity of a regulation whose violation would incur the possibility of severe fines and imprisonment. The court's opinion implicitly acknowledged that, had it not been for the totality of the Act's structure with regard to criminal enforcement proceedings, the clear language of section 307(b) would have compelled a finding that Congress intended to divest the federal courts of jurisdiction over section 112 challenges in all enforcement proceedings, criminal as well as civil. *See Adamo Wrecking*, 434 U.S. at 284, 98 S.Ct. at 572. The Court's *ratio decidendi* was unambiguous:

> *Since Congress chose to attach these stringent [criminal] sanctions* to the violation of an emission standard, in contrast to the violation of various other kinds of orders that might be issued by the Administrator, it is crucial to determine whether the Administrator's mere designation of a regulation as an 'emissions standard' is conclusive as to its character.

Id. at 283, 98 S.Ct. at 572 (emphasis added). In addition, faced with an admittedly unclear indication of the congressional intent underlying section 307(b)'s preclusive effect in criminal prosecutions, the Court further relied on "the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in

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[6] *See* note 3 *supra*.

favor of the defendant.' " *Id.* at 285, 98 S.Ct. at 572-73 (citations omitted). Neither rationale is applicable in the context of civil proceedings. In light of section 307(b)'s clear language and Congress's manifest intent to avoid protracted and inconsistent adjudications over the validity of EPA emission standards,[7] we

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[7] The Senate Report observed that prompt resolution of certain EPA actions in a single judicial forum was desirable "[b]ecause many of these administrative actions are national in scope and require even and consistent national application." S.Rep. No. 1196, 91st Cong., 2d Sess. 441 (1970); *see also Adamo Wrecking*, 434 U.S. at 284, 98 S.Ct. at 572 (noting § 307(b)(2)'s "twin congressional purposes of insuring that the substantive provisions of the standard would be uniformly applied and interpreted and that the circumstances of its adoption would be quickly reviewed by a single court intimately familiar with administrative procedures"); *Chrysler Corp. v. EPA*, 600 F.2d 904, 910-12 (D.C.Cir.1979); *Lubrizol Corp. v. Train*, 547 F.2d 310, 311-17 (6th Cir.1976); *Natural Resources Defense Council, Inc. v. EPA*, 512 F.2d 1351, 1353-56 (D.C.Cir.1975); *Granite City Steel Co. v. EPA*, 501 F.2d 925, 926 (7th Cir.1974).

This assessment of congressional intent echoes our recent decision in *RSR Corp. v. Donovan*, 747 F.2d 294 (5th Cir.1984). In *RSR Corp.*, we examined the effect of § 6(f) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 655(f) (1982), which constitutes the exclusive vehicle for pre-enforcement review of standards promulgated under OSHA, but which does not speak to the preclusive effect of that act on a federal court's jurisdiction to hear regulatory challenges that arise in the context of OSHA enforcement proceedings. We stated that

> when an employer has participated in the rulemaking and pre-enforcement review of an OSHA regulation and could have then asserted either a substantive or procedural challenge to its validity, but did not, and has no excuse for its failure to do so, we will not entertain the challenge in an enforcement proceeding.

747 F.2d at 302. *A fortiori*, to the extent we discerned that Congress intended to foreclose judicial review under the circumstances of *RSR Corp.* there is little room for doubt regarding congressional intent where, as here, the relevant statute speaks not only to the existence and nature of pre-enforcement review but also to the non-existence of enforcement-*cum*-review. *Compare, e.g., Shell Oil Co. v. FERC*, 707 F.2d 230, 235 (5th Cir.1983) ("Anyone aggrieved by a rule established in a rulemaking must challenge it within the prescribed appeal period or forever hold

would be remiss to allow the narrow holding of *Adamo Wrecking* to bulldoze the statute's jurisdictional limitations in civil enforcement proceedings.[8] *Cf. Yakus v. United States,* 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (upholding previous attempt by Congress, in the context of criminal enforcement proceedings, to require that the validity of regulatory action be challenged in a particular court at a particular time).

Moreover, even if *Adamo Wrecking* were applicable to the case at hand, we would at most be allowed to inquire whether the regulations constitute emission standards on their face.[9] Assuming

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his peace.") *with Texas v. United States,* 749 F.2d 1144, 1146-47 (5th Cir.1985) (construing 60-day provision for judicial review in Administrative Orders Review Act of 1950) ("Hobbs Act"), 28 U.S.C. § 2344 (1982), not to preclude all substantive challenges to rule's validity when the rule is later applied).

[8] Concurring in *Adamo Wrecking,* Justice Powell expressed concern over the due process implications of section 307(b)'s jurisdictional limitations, at least in the context of a criminal prosecution. 434 U.S. at 289-91, 98 S.Ct. at 575-76 (Powell, J., concurring): *see also id.* at 293 n.*, 98 S.Ct at 577 n.* (Stewart, J., dissenting). Like the Court in *Adamo Wrecking,* we are not presented with any challenge based on the due process theory that section 307(b) affords interested parties inadequate notice. *See Harrison v. PPG Indus.,* 446 U.S. 578, 592 n. 9, 100 S.Ct. 1889, 1897 n. 9, 64 L.Ed.2d 525 (1980): *id.* at 594, 100 S.Ct. at 1898 (Powell, J., concurring). Appellees have not raised the issue, and indeed they would probably lack standing to do so, since each of the three companies was on actual notice and participated in the comment proceedings that accompanied the promulgation of these regulations. *Cf. Natural Resources Defense Council, Inc. v. EPA,* 673 F.2d 400, 406-07 (D.C.Cir), *cert denied,* 459 U.S. 879, 103 S.Ct. 175, 74 L.Ed.2d 143 (1982).

[9] Where appropriate, such inquiries often entangle courts in the somewhat paradoxical endeavor of considering the merits of a dispute—for instance, whether a regulation is substantively valid as an emission standard or invalid as a work practice standard—in order to ascertain whether jurisdiction over the dispute exists in the first place. This intertwining of substantive and jurisdictional issues, however, is not an uncommon feature of answering the jurisdictional question. *See, e.g., E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 125, 97 S.Ct.

for the moment that this limited inquiry is warranted, we take heed of the Court's cautionary words in *Adamo Wrecking:*

> We are aware of the possible dangers that flow from this interpretation; district courts will be importuned, under the guise of making a determination as to whether a regulation is an "emission standard," to engage in judicial review in a manner that is precluded by § 307(b)(2) of the Act. This tney may not do. The narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding. The question is only whether the regulation which the defendant is alleged to have violated is on its face an "emission standard" within the broad limits of the congressional meaning of that term.

434 U.S. at 285, 98 S.Ct. at 573. In answering this question, we have no trouble labeling the regulations as emission rather than work practice standards since each sets a "no discharge" cap on the amount of vinyl chloride and polyvinyl chloride that can be emitted. Where the regulations can be violated only by transgressions of this purely numerical discharge requirement, it cannot be said that the regulations are not on their face emission standards, or, more to the point, that the Administrator's characterization of them as such is unreasonable, *see, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* ____ U.S. ____, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 121, 93 S.Ct. 2080, 2095, 36 L.Ed.2d 772 (1973); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969); *Udall v. Tallman,* 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *PPG Industries v.*

965, 973, 51 L.Ed.2d 204 (1977); *Louisiana Chemical Ass'n v. Bingham, 657 F2d 777, 782 & n. 7 (5th Cir.1981).*

Harrison, 660 F.2d 628, 633 (5th Cir.1981). *Accord Luckie,* 752 F.2d at 456-57; *Borden,* 572 F.Supp. at 691.

Thus, to the extent section 307(b) requires us to determine as a preliminary matter whether these EPA regulations are emission standards, we hold for purposes of that jurisdictional inquiry that they are. The district court was consequently without jurisdiction to pass on the substantive validity of sections 61.64(a)(3) and 61.65(a) under the Clean Air Act, and the government, *qua* cleaner, may press its suit.

REVERSED AND REMANDED.

APPENDIX B

576 Federal Supplement

United States of America

v.

Ethyl Corporation.

Civ. A. No. 83-0120-A.

United States District Court,
M.D. Louisiana.

July 1, 1983.

United States brought action against the company, alleging violation of regulations governing the emergency discharges of vinyl chloride. On the company's motion to dismiss, the District Court, John V. Parker, Chief Judge, held that Environmental Protection Agency regulations which govern emergency discharges of vinyl chloride and which require compliance with work practices set out by the EPA were work practice standards, despite their designation as emissions standards, and because the regulations were promulgated prior to the 1977 amendments to the Clean Air Act which authorized the Administrator to enforce work practice standards, the regulations were unenforceable by the District Court.

Motion granted.

1. Health and Environment—25.6(3)

Under the Clean Air Act, an emission standard is to be distinguished from a work practice standard; an emission standard is a quantitative level to be attained by use of techniques, controls, and technology, and when it is not feasible to prescribe or enforce an emission standard, Administrator of the Environmental Protection Agency is authorized to enact a design, equipment, work practice, or operational standard. Clean Air Act, § 112(c), as amended, 42 U.S.C.A. § 7412(c).

2. Health and Environment—25.6(3)

Emission standards under the Clean Air Act should establish a numerical limit requiring little of the court but its power to

enforce compliance after an obvious violation. Clean Air Act, § 112(e), as amended, 42 U.S.C.A. § 7412(e).

3. Health and Environment—25.6(9)

Environmental Protection Agency regulations which govern emergency discharges of vinyl chloride and which require compliance with work practices set out by the EPA were work practice standards, despite their designation as emissions standards, and because the regulations were promulgated prior to the 1977 amendments to the Clean Air Act which authorized the Administrator to enforce work practice standards, the regulations were unenforceable by the District Court. Clean Air Act, § 112(e), as amended, 42 U.S.C.A. § 7412(e).

Ian Hipwell, Asst. U.S. Atty., Baton Rouge, La., for plaintiff.

Ronald A. Seale, Seale, Smith & Phelps, Baton Rouge, La., for defendant.

JOHN V. PARKER, Chief Judge.

This matter is presently before the court on defendant's motion to dimiss for failure to state a claim upon which relief can be granted. Each side has urged its position in oral argument and has submitted additional briefs on issues raised in argument. After carefully considering all the arguments and conducting its own research, the court concludes that it has no choice but to grant the motion.

The complaint alleges that Ethyl Corporation discharged vinyl chloride on at least 98 separate occasions over a six year period from 1977 to 1982 from its Baton Rouge, Louisiana plant, all in violation of the Clean Air Act, 42 U.S.C. § 7401, *et seq.* Specifically, the complaint alleges that Ethyl discharged at least 168,622.7 pounds of vinyl chloride to the atmosphere from relief valves on equipment in vinyl chloride service on at least 81 separate occasions—all in violation of 40 C.F.R. § 61.65(a). That regulation provides that

> Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief

> discharge means a discharge which could not have been avoided by taking measures to prevent the discharge.

In addition, Ethyl additionally manually vented gas containing at least 14,596 pounds of vinyl chloride from valves on polyvinyl chloride reactors on 17 separate occasions, thereby violating 40 C.F.R. § 61.64(a)(3)—which again prohibits discharges which could "have been avoided by taking measures to prevent" them. The complaint seeks to enjoin Ethyl from future violations of the vinyl chloride regulations and to require that Ethyl develop and implement a plan to prevent future discharges of vinyl chloride. The government also seeks a civil penalty of $25,000 for each day that Ethyl violated the regulations at issue.

The enforceability of these regulations depends upon their characterization as "emission standards" or "work practice" standards. Making that deceptively simple characterization first requires a journey through the labyrinths of the Clean Air Act.

Under Section 112 of the Clean Air Act the Administrator of the Environmental Protection Agency (EPA) is authorized to promulgate regulations setting emission standards for hazardous air pollutants. 42 U.S.C. § 7412. A "hazardous air pollutant" presently is defined as one "to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C.. § 7412(a)(1).

The Administrator designated vinyl chloride[1] a hazardous air pollutant in December 1975. 40 Fed.Reg. 59477. In October 1976, he promulgated the emissions standards for vinyl chloride. 41 Fed.Reg. 46560, now codified at 40 C.F.R. § 61.60 *et seq.*

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[1] For a discussion of vinyl chloride, its uses in industry and its effects upon those who are exposed to it, *see, e.g., Society of the Plastics Industry, Inc. v. Occupational Safety & Health Administration.* 509 F.2d 1301 (2d Cir.1975); Doniger, *Federal Regulation of Vinyl Chloride: A Short Course in the Law and Policy of Toxic Substances Control,* 7 Ecology L.Q. 497 (1978).

Discharging an air pollutant in violation of the applicable emission standard is prohibited under Section 112(c)(1)(B) of the Clean Air Act. 42 U.S.C. § 7412(c)(1)(B). That violation subjects the violator to civil penalties and an injunction under 42 U.S.C. § 7413(b)(3). And the last passageway in this matrix leads to the controversial jurisdictional bar. Under Section 307(b) of the Act:

> (b)(1) A petition for review of action of the Administrator in promulgating any . . . emission standard or requirement under Section 7412 . . . may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under Section . . . 7412(c) . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.
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> * * *
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> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. 42 U.S.C. § 7607.

The reference to "requirement" in 42 U.S.C. § 7607(b)(1) was added in the 1977 technical amendments. Pub.L. No. 95-190, 91 Stat. 1399. Prior to that time, the Administrator's authority, the enforcement provisions, and the jurisdictional limits all were couched in terms of "emissions standards." (*See e.g.*, § 112(b)(1)(B), as exacted in 1970, Pub.L. No. 91-604, 84 Stat. 1676, § 112(b)(1)(B) (1970) which authorized the setting of "emission standards.") That language caused a split in lower court decisions on whether work practice requirements were permitted under the Act. Congress soon thereafter added Section 112(e) which authorized work practice standards where "it is not feasible to prescribe or enforce an emission standard." 42 U.S.C. § 7412(e)(1) (West Supp.1978). This standard is set out in terms of "a design, equipment, work practice, or operational standard, or combination thereof" rather than in terms of limiting emissions. 42 U.S.C. § 1712(e)(1) (West Supp.1978). The Supreme Court, in *Adamo Wrecking Co. v. United States,* 434 U.S.

275, 98 S.Ct. 566, 54 L.Ed.2d 538 (1978) interpreted this sequence of events as an indication that authority to issue requirements—or work practice standards—did not exist prior to the 1977 amendments. 434 U.S. at 283-84, 98 S.Ct. at 572.

Curiously, however, while the 1977 amendments gave the Administrator the authority to promulgate work practice regulations, he seemingly had no authority to enforce them—the enforcement provision referred only to violations of "emission standards." 42 U.S.C. § 7413(b); 434 U.S. at 306, 98 S.Ct. at 583. Congress again reacted and added 42 U.S.C. § 7412(e)(5) in 1978 which provides that "[a]ny design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as an emission standard for purposes of the provisions of this chapter"; *i.e.,* a work practice standard equals an emissions standard for purposes of enforcement. Pub.L. No. 95-623.

In *PPG Industries v. Harrison,* 660 F.2d 628, 636 (5th Cir.1981), the court cited *Adamo* and held that the EPA had authority to issue only emission standards before the 1977 amendments. While *PPG* concerned Section 111 of the Act, the issues were analogous to that of the instant case—whether the contested regulation was a work practice standard, and, if so, whether it was enforceable since it was enacted prior to the 1977 amendments. The court determined that the regulation was "a work practice or operation standard beyond the statutory authority of the EPA" and such requirements are enforceable only if promulgated subsequent to the 1977 amendments. *Id.* While the Administrator reminds us that we may not consider the sufficiency of the regulation and argues that it is indeed an emission standard, we note the words of Justice Rehnquist in *Adamo Wrecking,* "Congress . . . did not empower the Administrator, after the manner of Humpty Dumpty in Through the Looking-Glass, to make a regulation an emission standard by his mere designation." 434 U.S. at 283, 98 S.Ct. at 572. Section 307 of the Act bars judicial review of the sufficiency or appropriateness of a regulation, but it does not bar the narrow inquiry as to "whether the regulation which the defendant is alleged to have violated is on its face 'an

emission standard' within the broad limits of the congressional meaning of that term." 434 U.S. at 287, 98 S.Ct. at 573.

The regulations governing emergency discharges of vinyl chloride were promulgated in October 1976, prior to the 1977 amendments. 41 Fed.Reg. 46560, now codified at 40 C.F.R. § 6160 *et seq.;* specifically, 40 C.F.R. §§ 61.65(a) and 61.64(a)(3). Thus, those regulations may be enforced by this court only if they are in fact emission standards and not work practice regulations camouflaged under the rubric of "emission standards."

Apparently, the two regulations covering emergency discharges of vinyl chloride have been used for little but gathering dust since their enactment. Few cases discuss the work practice/emission limitations dichotomy, and even fewer concern vinyl chloride regulations.[2] The one reported case discovered mentions the regulations at issue here, but that case was dismissed on other grounds. *Hooker Chemical Company v. United States Environmental Protection Agency,* 642 F.2d 48 (3d Cir.1981). Both sides have referred to a case subsequently arising out of that litigation, *United States of America v. Tenneco Chemicals,* No. 80-4141 (D.N.J. July 6, 1981), where the court, in an unpublished

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[2] While virtually no jurisprudence exists on this issue, a few commentators have discussed the vinyl chloride regulations. Two commentators writing after the *Adamo* decision characterized the vinyl chloride standards as work practice standards which would have to be repromulgated under the 1977 amendments. Citing § 61.65 specifically, Doniger matter of factly describes it as specifying "the use of certain equipment and operational techniques." Doniger, *supra,* at 566. (See other references to work practice regulations for vinyl chloride at p. 567, n. 360; p. 568, n. 361; and p. 578.) Another commentator wrote that in some situations, a quantitative limit on emissions "is not practical, either because measurement techniques are available, or because emissions come from many small points in a process and are most easily controlled by numerous equipment or work practice measures at those points. The 1973 asbestos standard and the 1976 vinyl chloride standard both included such measures." ENVIRONMENTAL LAW INSTITUTE, *Design, Equipment, Work Practice or Operational Standards: The 1977 Amendments and Adamo Wrecking Co.,* in AIR AND WATER POLLUTION CONTROL LAW: 1980 at 183 (Wetstone, ed. 1980).

opinion, disposed of numerous defenses raised by Tenneco again under the same provision at issue here, but the court did not mention whether the regulation was challenged as being a work practice regulation. Thus the court now finds itself in the uneasy position of plowing not really new ground, but ground that has lain dormant these many years.

The government argues that 40 C.F.R. §§ 61.65(a) and 61.64(a)(3)[3] are emission standards setting a quantifiable limit of zero emissions but which also allow the violator to assert an affirmative defense of emergency discharge under certain conditions.

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[3] 61.65(a) *Relief valve discharge.* Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge *which could not have been avoided by taking measures to prevent the discharge.* Within 10 days of any relief valve discharge, the owner or operator of the source from which the relief valve discharge occurs shall submit to the Administrator a report in writing containing information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges.

61.64(a)(3) Manual vent valve discharge: Except for an emergency manual vent valve discharge, there is to be no discharge to the atmosphere from any manual vent valve on a polyvinyl chloride reactor in vinyl chloride service. *An emergency manual vent valve discharge means a discharge to the atmosphere which could not have been avoided by taking measures to prevent the discharge.* Within 10 days of any discharge to the atmosphere from any manual vent valve, the owner or operator of the source from which the discharge occurs shall submit to the Administrator a report in writing containing the information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determing the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges. (Emphasis added)

Ethyl responds that the regulations, while phased in terms of no discharge, indirectly require the use of certain work practices. The regulations actually allow non-quantifiable discharges of vinyl chloride, provided certain work practices and operational techniques are observed.

[1] An emission standard is to be distinguished from a work practice standard. An emission "standard is a quantitative 'level' to be attained by use of 'techniques,' 'controls,' and 'technology'." *Adamo Wrecking Co. v. United States,* 434 U.S. at 286, 98 S.Ct. at 573. When "it is not feasible to prescribe or enforce an emission standard," the Administrator is now authorized to enact a "design, equipment, work practice, or operational standard." 42 U.S.C. § 7412(e)(1). The regulation at issue in *Adamo* had been proposed originally as a limit on emissions of zero.[4]

The Administrator concluded, however, after examining the situation, that it would often be impossible to preclude all visible emissions of asbestos during the course of demolition. He chose instead to regulate work practices during demolitions. *Adamo Wrecking Co. v. United States, supra,* 434 U.S. at 287, 98 S.Ct. at 574. Ethyl argues that the defendant in *Adamo* had two choices: He could have zero emissions or he could comply with the work practices required by the regulations. Ethyl contends it has the same two choices: It may have zero emissions or it may comply with the instructions set out by the EPA in the preamble to the regulations, which describe the "measures" required by the EPA to prevent "avoidable" discharges:

> A zero emission limit is being proposed for relief discharges which can be prevented. In most case, such discharges from reactors can be prevented by measures including, but not limited to, properly instrumenting the reactors to detect upset conditions, injecting chemicals to

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[4] "Zero" emissions are possible under the Act. See S.Rep. No. 1196, 91st Cong., 2d Sess. at 20 (1970) and Senate Comm. on Public Works, "Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970," reprinted in A Legislative History of the Clean Air Amendments of 1970, Ser. No. 93-18, 93rd Cong., 2d Sess. at 133 (1974).

> stop the polymerization reaction during upset conditions, venting the reactor contents to a gasholder during upset conditions and ultimately to a recovery system, providing employees with improved training on preventing and handling upset conditions, and utilizing a stand-by source of power. For other pieces of equipment, increasing pressure due to inert gases in the system can be relieved by manual venting to a gasholder or recovery system. The conditions which lead to discharges can also be prevented in most cases by proper handling and transfer of vinyl chloride or materials containing vinyl chloride. Discharges which cannot be avoided by taking such preventive measures, such as those caused by natural disaster, will not be in violation of the proposed standard if the owner or operator notifies EPA within 10 days concerning the nature and cause of the discharge. This notification provision is necessary to permit EPA to investigate the surrounding conditions and determine whether the discharge could have been prevented. 40 Fed.Reg. 59539.

Plainly the Administrator does not limit "emergency" to earthquake, tornado, flood or other natural disaster, for the regulations themselves speak in terms of discharges which could not have been avoided by taking "measures." The court can only conclude that the regulations equate "measures" to "work practices" and the Agency's posture in *United States v. Tenneco Chemicals, Inc., supra,* fortifies this conclusion. The court there noted that the EPA had instructed Tenneco that only emergency discharges of vinyl chloride that could not have been prevented by taking certain precautions were allowed. A letter from the EPA had advised Tenneco that the company must demonstrate that discharges could not have been prevented by implementing any of the following procedures:

(1) employee training programs, including instructions on emergency procedures;

(2) proper inspection and maintenance programs (including replacement of relief valve seals on a sufficiently frequent basis in order to prevent their rupture);

(3) proper design and operation of process and control equipment; and

(4) installation and operation of all control equipment needed to comply with the vinyl chloride standard.

Each of the "measures" to which the EPA made reference relates to "design, equipment, work practice, or operational standard, or combination thereof," the definition of work practice. 42 U.S.C. § 7412(c).

Ethyl argues, therefore, that the court's determination of whether a source has violated the emergency discharge regulations will be based not on the quantity of what is emitted but on whether the source has implemented the measures required by the EPA.

Exactly what constitutes an "emergency" or an "avoidable discharge" is unclear. The government argues that that very uncertainty is what renders this regulation an emissions limitation. The government continues that Ethyl is limited to zero emissions by whatever method it chooses; it is allowed, however, to discharge in an emergency—an argument which takes this court in a circle, right back to the definition of "emergency." What the regulation actually says is that unavoidable discharges are those which could not be avoided by the application of work practices.

A commentator discussing the enactment of the Clean Air Act emphasized the need to construe the Act as a whole. The "attainment of ambient air quality," he quoted from Senate Reports, "is possible only through the enforcement of precise and objective emission controls." Jorling, *The Federal Law Pollution Control,* in FEDERAL ENVIRONMENT LAW 1101 (E. Dolgin and T. Guilbert, eds. 1974). An emission standard, according to the Senate Report and the commentator's opinion, had to be one capable of being enforced without "reanalysis of technological or other considerations; . . . an objective evidentiary standard would have to be met." *Id.* at 1102. Once standards are set their violation "should be a relatively clear evidentiary matter." *Id.* at 1107.

[2] The need for prompt enforcement of regulations which are violated, the court's lack of technological and scientific expertise, the time and study which should preface the promulgation of a regulation—all support the wisdom behind the Congressional intent that emission standards, when finally set, should establish a numerical limit requiring little of the court but its power to enforce compliance after an obvious violation. The 1977 amendment setting out the procedure for promulgating work practice operations likewise has at its base the necessity for clear, objective regulations setting out precise requirements that must be met in certain situations. 42 U.S.C. § 7412(e).

[3] These emergency discharge regulations do not meet those goals of clarity and ease of enforcement. The court is aware, of course, that it may not look into the sufficiency of a regulation promulgated by the Administrator. If these regulations are emissions standards, they must be enforced no matter how poorly drafted.

Sections 69.65(a) and 61.64(a)(3), however, require the use of "measures" to avoid emitting vinyl chloride. It is true that these measures are not set out with specificity as is required under the 1977 amendments, but they nevertheless do require compliance with work practices set out, however vaguely, by the EPA. The conclusion is inescapable that these regulations, despite being designated as emission standards by the Administrator, are work practice standards within the meaning of the Act. Compliance with these elusive work practices renders any discharge "unavoidable" and thus non-violative of the regulations. Since they are work practice regulations promulgated prior to the 1977 amendments, they are unenforceable by this court.

Accordingly, defendant's motion to dismiss for failure to state a claim upon which relief can be granted is hereby GRANTED.

APPENDIX C

In the United States District Court
for the Middle District of Louisiana
Civil Action No. 83-1020
Sec. A

United States of America,
Plaintiff,

v.

Ethyl Corporation,
Defendant.

COMPLAINT

Plaintiff, the United States of America, through its undersigned attorneys, by authority of the Attorney General of the United States and at the request of the Administrator of the United States Environmental Protection Agency, ("EPA") alleges the following:

NATURE OF THE ACTION

1. This is a civil action brought pursuant to Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b) for civil penalties and injunctive relief to abate continuing discharges of vinyl chloride, a hazardous air pollutant, in violation of Section 112 of the Clean Air Act, 42 US.C. §7412.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this action pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b) and pursuant to 28 U.S.C. §§ 1331, 1345 and 1355.

3. Venue is proper in this District pursuant to 42 U.S.C. § 7413(b) and 28 U.S.C. § 1391(b) and (c) because defendant does business in, and the claim arose within, the Middle District of Louisiana.

4. Authority to bring this action is vested in the United States Department of Justice pursuant to Section 305 of the Act, 42 U.S.C. § 7605.

5. Notice of commencement of this action has been given to the Louisiana Department of Natural Resources pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b).

6. Defendant Ethyl Corporation is a corporation organized under the laws of the State of Virginia and doing business at Baton Rouge, Louisiana, which is within the jurisdiction of this Court. At all times relevant herein, defendant was engaged, and is now engaged in the business of manufacturing vinyl chloride, which is used in the production of plastics. Defendant now owns and operates and at all times relevant to this Complaint did own and operate ethylene dichloride, vinyl chloride monomer and polyvinyl chloride facilities at Baton Rouge, Louisiana ("the Baton Rouge Plant"), which is the subject of this action. Defendant is a "person" as defined by 42 U.S.C. § 7602(e), within the meaning of 42 U.S.C. § 7413(b).

7. Section 112 of the Act, 42 U.S.C. § 7412, requires the Administrator of the EPA ("the Administrator") to publish a list of hazardous air pollutants and to establish emission standards for each pollutant on the list. These standards are known as the National Emission Standards for Hazardous Air Pollutants ("NESHAP").

8. Section 112(a)(1) of the Act, 42 U.S.C. § 7412(a)(1), defines a hazardous air pollutant as "an air pollutant to which no ambient air quality standard is applicable and which . . . causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness."

9. On December 24, 1975, pursuant to Section 112(b) of the Act, the Administrator designated vinyl chloride a hazardous air pollutant. 40 Fed. Reg. 59477. Vinyl chloride was designated a hazardous air pollutant because, *inter alia,* it had been implicated as the causal agent of angiosarcoma, a form of liver cancer, and other carcinogenic and non-carcinogenic disorders in people with occupational exposure and in animals with experimental exposure

to the substance. The emission standard for vinyl chloride was promulgated as a final regulation ("National Emission Standard for Vinyl Chloride") on October 21, 1976 (41 Fed. Reg. 46560, now codified at 40 C.F.R. § 61.60 *et seq.)*. The Baton Rouge plant, owned and operated by defendant, is subject to the National Emission Standard for Vinyl Chloride.

10. Vinyl chloride is a hydrocarbon which is a gas at ambient temperature and atmospheric pressure, but is normally processed, shipped and stored as a liquid under pressure in vessels, transfer lines, polyvinyl chloride ("PVC") reactors (or autoclaves) and other equipment. At the Baton Rouge plant, vinyl chloride monomer ("VCM") is made and stored in vessels and then piped to the PVC plant. At the PVC plant, VCM is stored in spheres and then piped into PVC reactors, which operate at high temperatures and pressures. When polymerization of VCM in a PVC reactor reaches the desired degree of completion, (percentage conversion of VCM to PVC) unreacted VCM is stripped from the final product and recovered through a system of compression and cooling before being recycled through purification equipment to be used again. Conventional venting of VCM that routinely occurs as a part of the normal VCM and PVC plant process operations is controlled by combustion in an incinerator and/or dedicated ethylene dichloride cracking furnaces before being emitted to the atmosphere.

The equipment at the Baton Rouge plant is protected from rupturing due to excess pressure build-ups by safety relief valves, rupture disks, manual vent valves or a combination of such devices, which also protect the safety of personnel near the equipment. Uncontrolled emissions of vinyl chloride into the atmosphere may occur from the safety devices when excess pressure occurs in the equipment or it is judged necessary to release gas containing vinyl chloride to avoid the danger of fire or explosion due to other unsafe conditions that threaten human life.

However, there are various preventive measures which include improved process design, improved operational/maintenance procedures, training, and/or auxiliary equipment which can either prevent excess pressure or other unsafe conditions from occurring in the equipment or permit timely correction of a high pressure

situation before the safety device(s) become(s) activated and discharged to the atmosphere in an uncontrolled manner.

11. Pursuant to 40 C.F.R. § 61.65, an owner or operator of an ethylene dichloride, vinyl chloride and/or polyvinyl chloride plant shall comply with the following requirement:

> (a) *Relief valve discharge.* Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge . . .

12. Pursuant to 40 C.F.R. § 61.64(a)(3), an owner or operator of a polyvinyl chloride plant shall comply with the following requirement:

> (a) Reactor. The following requirements apply to reactors:
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> * * *
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> (3) Manual vent valve discharge: Except for an emergency manual vent valve discharge, there is to be no discharge to the atmosphere from any manual vent valve on a polyvinyl chloride reactor in vinyl chloride service. An emergency manual vent valve discharge means a discharge to the atmosphere which could not have been avoided by taking measures to prevent the discharge. Within 10 days of any discharge to the atmosphere from any manual vent valve, the owner or operator of the source from which the discharge occurs shall submit to the Administrator a report in writing containing information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges.

13. Section 112(c)(1)(B) of the Act, 42 U.S.C. § 7412(c)(1)(B), provides that no air pollutant to which an emission standard applies may be emitted from any stationary source in violation of the standard.

14. The Baton Rouge plant is a "stationary source" as defined by 42 U.S.C. § 7412(a)(3), within the meaning of § 7412(c).

15. Section 112(c)(1)(B)(ii) of the Act, 42 U.S.C. § 7412(c)(1)(B)(ii), authorizes the Administrator to grant waivers of compliance with the emission standard for up to two years beyond the October 21, 1976 effective date for the purpose of installing necessary controls. Defendant Ethyl Corporation sought and received a waiver of compliance with the provisions of 40 C.F.R. § 61.64(a)(3) for manual vent valve discharges from PVC reactors at its polyvinyl chloride facility until July 1, 1978. Defendant never received a waiver of compliance from the October 21, 1976 date to comply with 40 C.F.R. § 61.65(a) for relief valve discharges.

16. Since October 21, 1976, Ethyl Corporation has discharged 168,622.7 pounds of vinyl chloride to the atmosphere at its Baton Rouge plant from relief valves on equipment in vinyl chloride service at least on eighty-one (81) occasions. None of these discharges was an "emergency relief discharge" as defined by 40 C.F.R. 61.65(a). The discharges occurred on the following dates:

(1) On or about March 18, 1977, defendant discharged approximately 8,200 pounds of vinyl chloride from the relief valve on a PVC reactor #A-11;

(2) On or about April 1, 1977, defendant discharged approximately 1,000 pounds of vinyl chloride from the relief valve on storage tank #D-123A at the PVC plant;

(3) On or about April 6, 1977, defendant discharged approximately 350 pounds of vinyl chloride from the relief valve on degassing vessel #D-112B;

(4) On or about May 1, 1977, defendant discharged approximately 350 pounds of vinyl chloride from the relief valve on degassing vessel #D-112B;

(5) On or about June 16, 1977, defendant had two discharges totaling approximately 820 pounds of vinyl chloride, one from the

relief valve on reactor #A-15 and one from a relief valve on the post vacuum system for suspension reactors;

(6) On or about June 29, 1977, defendant discharged approximately 60 pounds of vinyl chloride from the relief valve on degasser #D-112B;

(7) On or about July 22, 1977, defendant discharged approximately 2,160 pounds of vinyl chloride from the relief valve on PVC reactor #A-11;

(8) On or about July 31, 1977, defendant discharged approximately 78 pounds of vinyl chloride from the relief valve on vacuum knockout drum #D-148B at the PVC plant;

(9) On or about August 2, 1977, defendant discharged approximately 150 pounds of vinyl chloride from the relief valve on VCM storage tank #D-123A at the PVC plant;

(10) On or about August 15, 1977, defendant discharged approximately 4800 pounds of vinyl chloride from the relief valve on reactor #B-20;

(11) On or about October 14, 1977, defendant discharged approximately 60 pounds of vinyl chloride from the relief valve on degassing vessel #D-112C;

(12) On or about October 23, 1977, defendant discharged approximately 59 pounds of vinyl chloride from the relief valve on vacuum knockout drum #D-148B at the PVC plant;

(13) On or about November 2, 1977, defendant discharged approximately 292 pounds of vinyl chloride from the relief valve on degassing vessel #D-612;

(14) On or about November 11, 1977, defendant discharged approximately 99 pounds of vinyl chloride from the relief valve on reactor #A-17;

(15) On or about November 20, 1977, defendant discharged approximately 328.7 pounds of vinyl chloride from the relief valve on degassing vessel #D-112C and the relief valve on reactor #A-17;

(16) On or about November 28, 1977, defendant discharged approximately 1,657 pounds of vinyl chloride from the relief valve on degassing vessel #D-112B;

(17) On or about December 1, 1977, defendant discharged approximately 828 pounds of vinyl chloride from the relief valve on degasser #D-112C:

(18) On or about December 5, 1977, defendant discharged approximately 120 pounds of vinyl chloride from the relief valve on degassing vessel #D-112C;

(19) On or about December 14, 1977, defendant discharged approximately 2,127 pounds of vinyl chloride from the relief valve on reactor #B-2;

(20) On or about December 19, 1977, defendant discharged approximately 389 pounds of vinyl chloride from the relief valve on reactor #A-19;

(21) On or about December 28, 1977, defendant discharged approximately 6,409 pounds of vinyl chloride from the relief valve on reactor #A-17;

(22) On or about January 5, 1978, defendant discharged approximately 856 pounds of vinyl chloride from the relief valve on degassing vessel #D-112C;

(23) On or about January 10, 1978, defendant discharged approximately 3,982 pounds of vinyl chloride from the relief valve on reactor #A-13;

(24) On or about January 11, 1978, defendant discharged approximately 993 pounds of vinyl chloride from the relief valve on reactor #A-13;

(25) On or about January 13, 1978, defendant discharged approximately 331 pounds of vinyl chloride from the relief valve on reactor #A-13;

(26) On or about January 19, 1978, defendant discharged approximately 5,800 pounds of vinyl chloride from the relief valve on reactor #B-12;

(27) On or about January 20, 1978, defendant discharged approximately 39 pounds of vinyl chloride from the relief valve on post vacuum system from reactor A-17, i.e. the post vacuum system for suspension reactors;

(28) On or about February 9, 1978, defendant discharged approximately 450 pounds of vinyl chloride from the relief valve on degassing vessel #D-612;

(29) On or about February 12, 1978, defendant discharged approximately 585 pounds of vinyl chloride from the relief valve on the post vacuum system for suspension reactors;

(30) On or about February 13, 1978, defendant discharged approximately 331 pounds of vinyl chloride from the relief valve on reactor #B-16;

(31) On or about February 14, 1978, defendant discharged approximately 321 pounds of vinyl chloride from the relief valve on reactor #A-15;

(32) On or about February 16, 1978, defendant discharged approximately 1,954 pounds of vinyl chloride from the relief valve on reactor #A-11;

(33) On or about February 28, 1978, defendant had two discharges totaling approximately 3,888 pounds of vinyl chloride from the relief valve on reactor #B-18 and the relief valve on degassing vessel #D-612;

(34) On or about March 13, 1978, defendant discharged approximately 585 pounds of vinyl chloride from the relief valve on the post vacuum system for the suspension reactors;

(35) On or about March 17, 1978, defendant discharged approximately 1,990 pounds of vinyl chloride from the relief valve on reactor #A-13;

(36) On or about March 30, 1978, defendant discharged approximately 59 pounds of vinyl chloride from the relief valve on vacuum knockout drum #D-148B at the PVC plant;

(37) On or about April 19, 1978, defendant discharged approximately 73 pounds of vinyl chloride from the relief valve on degassing vessel #D-612;

(38) On or about April 24, 1978, defendant discharged approximately 3,840 pounds of vinyl chloride from the relief valve on reactor #B-16;

(39) On or about May 2, 1978, defendant discharged approximately 9,551 pounds of vinyl chloride from the relief valve on reactor #A-15;

(40) On or about May 16, 1978, defendant discharged approximately 146 pounds of vinyl chloride from the relief valve on degassing vessel #D-612;

(41) On or about June 7, 1978, defendant discharged approximately 159 pounds of vinyl chloride from the relief valve on reactor #B-10;

(42) On or about August 3, 1978, defendant discharged approximately 600 pounds of vinyl chloride from the relief valve on the post vacuum system for suspension reactors;

(43) On or about August 16, 1978, defendant discharged approximately 600 pounds of vinyl chloride from the relief valve on the post vacuum system for suspension reactors;

(44) On or about September 22, 1978, defendant discharged approximately 53 pounds of vinyl chloride from the relief valve on reactor #B-14;

(45) On or about September 24, 1978, defendant discharged approximately 146 pounds of vinyl chloride from the relief valve on the post vacuum system for suspension reactors and from the relief valve on reactor #B-14;

(46) On or about September 25, 1978, defendant discharged approximately 300 pounds of vinyl chloride from the relief valve on the post vacuum system for suspension reactors;

(47) On or about October 6, 1978, defendant discharged approximately 640 pounds of vinyl chloride from the relief valve on reactor #A-15;

(48) On or about November 7, 1978, defendant discharged approximately 11,130 pounds of vinyl chloride from the relief valve on reactor #A-17;

(49) On or about November 13, 1978, defendant discharged approximately 6,240 pounds of vinyl chloride from the relief valve on reactor #B-18;

(50) On or about December 9, 1978, defendant discharged approximately 1200 pounds of vinyl chloride from the relief valve on the post vacuum system for suspension reactors;

(51) On or about January 11, 1979, defendant discharged approximately 320 pounds of vinyl chloride from the relief valve on reactor #B-16;

(52) On or about January 15, 1979, defendant discharged approximately 1,305 pounds of vinyl chloride from the relief valve on degassing vessel #D-112B;

(53) On or about January 23, 1979, defendant discharged approximately 2,560 pounds of vinyl chloride from the relief valve on reactor #B-16;

(54) On or about January 29, 1979, defendant discharged approximately 20 pounds of vinyl chloride from the relief valve on the post vacuum system for suspension reactors;

(55) On or about February 7, 1979, defendant discharged approximately 20 pounds of vinyl chloride from the relief valve on the post vacuum system for suspension reactors;

(56) On or about February 10, 1979, defendant discharged approximately 530 pounds of vinyl chloride from the relief valve on reactor #B-12;

(57) On or about March 25, 1979, defendant discharged approximately 200 pounds of vinyl chloride from the relief valve on post vacuum system for suspension reactors;

(58) On or about April 12, 1979, defendant discharged approximately 9,540 pounds of vinyl chloride from the relief valve on reactor #A-19;

(59) On or about April 29, 1979, defendant discharged approximately 53 pounds of vinyl chloride from the relief valve on reactor #B-8;

(60) On or about August 10, 1979, defendant discharged approximately 1,060 pounds of vinyl chloride from the relief valve on reactor #A-13;

(61) On or about September 7, 1979, defendant discharged approximately 3,240 pounds of vinyl chloride from the relief valve on reactor #A-17;

(62) On or about September 17, 1979, defendant discharged approximately 3,000 pounds of vinyl chloride from the relief valve on the post vacuum system for suspension reactors;

(63) On or about October 11, 1979, defendant discharged approximately 363 pounds of vinyl chloride from the relief valve on reactor #B-10;

(64) On or about November 13, 1979, defendant discharged approximately 575 pounds of vinyl chloride from the relief valve on reactor A-11;

(65) On or about November 15, 1979, defendant discharged approximately 8,150 pounds of vinyl chloride from the relief valve on reactor A-11;

(66) On or about November 28, 1979, defendant discharged approximately 340 pounds of vinyl chloride from the relief valve on degasser #D-162;

(67) On or about March 6, 1980, defendant discharged approximately 315 pounds of vinyl chloride from the relief valve on reactor #B-16;

(68) On or about April 12, 1980, defendant discharged approximately 10,870 pounds of vinyl chloride from the relief valve on reactor #A-15;

(69) On or about April 16, 1980, defendant discharged approximately 2,400 pounds of vinyl chloride from the relief valve on the post vacuum system for suspension reactors;

(70) On or about April 20, 1980, defendant discharged approximately 8,300 pounds of vinyl chloride from the relief valve on reactor #A-15;

(71) On or about July 5, 1980, defendant discharged approximately 555 pounds of vinyl chloride from the relief valve on reactor #A-7;

(72) On or about September 17, 1980, defendant discharged approximately 13,200 pounds of vinyl chloride from the relief valve on reactor #B-20;

(73) On or about October 28, 1980, defendant discharged approximately 1,140 pounds of vinyl chloride from the relief valve on reactor #A-7;

(74) On or about February 13, 1981, defendant discharged approximately 1,575 pounds of vinyl chloride from the relief valve on reactor #A-19;

(75) On or about March 17, 1981, defendant discharged approximately 51 pounds of vinyl chloride from the relief valve on degasser #D-112B;

(76) On or about April 7, 1981, defendant discharged approximately 105 pounds of vinyl chloride from the relief valve on reactor #A-9;

(77) On or about April 10, 1981, defendant discharged approximately 3,640 pounds of vinyl chloride from the relief valves on reactors A-9 and A-17;

(78) On or about April 15, 1981, defendant discharged approximately 20 pounds of vinyl chloride from the relief valve on the post vacuum line for suspension reactors;

(79) On or about May 20, 1981, defendant discharged approximately 6,300 pounds of vinyl chloride from the relief valve on reactor #B-18;

(80) On or about July 8, 1981, defendant discharged approximately 20 pounds of vinyl chloride from the relief valve on the post vacuum sytem for suspension reactors; and

(81) On or about April 30, 1982, defendant discharged approximately 1,070 pounds of vinyl chloride from the relief valve on reactor #A-13.

17. Since expiration of the waivers of compliance with 40 C.F.R. 61.64(a)(3), defendant manually vented gas containing 14,596 pounds of vinyl chloride to the atmosphere from manual/automatic emergency vent valves on polyvinyl chloride reactors in vinyl chloride service in violation of 40 C.F.R. 61.64(a)(3) on seventeen (17) occasions. These valves, also called "emergency automatic vent valves," are valves which are manually set to vent at a certain pressure. Unlike relief valves, the pressure settings on these valves can be manually changed at will. The discharges from the manual/automatic vent valves to the atmosphere occurred on the following dates:

(1) On or about July 14, 1978, defendant discharged approximately 52 pounds of vinyl chloride from reactor #B-18;

(2) On or about August 3, 1978, defendant discharged approximately 280 pounds of vinyl chloride from reactor #A-11;

(3) On or about August 10, 1978, defendant discharged approximately 28 pounds of vinyl chloride from reactor #B-4;

(4) On or about September 2, 1978, defendant discharged approximately 80 pounds of vinyl chloride from reactors #A-17 and A-11;

(5) On or about September 24, 1978, defendant discharged approximately 60 pounds of vinyl chloride from reactor #B-12;

(6) On or about October 18, 1978, defendant discharged approximately 25 pounds of vinyl chloride from reactor #B-8;

(7) On or about October 19, 1978, defendant discharged approximately 23 pounds of vinyl chloride from reactor #B-8;

(8) On or about October 28, 1978, defendant discharged approximately 20 pounds of vinyl chloride from reactor #A-5;

(9) On or about November 7, 1978, defendant discharged approximately 260 pounds of vinyl chloride from reactor #B-18;

(10) On or about December 9, 1978 defendant discharged approximately 1,590 pounds of vinyl chloride from reactor #A-17;

(11) On or about February 13, 1979, defendant discharged approximately 40 pounds of vinyl chloride from reactor #B-16;

(12) On or about April 10, 1979, defendant discharged approximately 60 pounds of vinyl chloride from reactor #A-9;

(13) On or about April 20, 1979, defendant discharged approximately 40 pounds of vinyl chloride from reactor #A-5;

(14) On or about May 12, 1980, defendant discharged approximately 410 pounds of vinyl chloride from reactor #A-11;

(15) On or about July 24, 1980, defendant discharged approximately 72 pounds of vinyl chloride from reactor #A-1;

(16) On or about October 2, 1981, defendant discharged approximately 36 pounds of vinyl chloride from reactor #A-5; and

(17) On or about January 11, 1982, defendant discharged approximately 11,520 pounds of vinyl chloride from reactors ##A-1, A-3 and A-11.

18. Each of the eighty-one (81) discharges from the relief valves, and the seventeen (17) discharges from the manual/automatic vent valves, constitutes a violation by defendant of 40 C.F.R. § 61.64(a)(3) or 40 C.F.R. § 61.65(a) and of 42 U.S.C. § 7412(c).

19. Section 113(b) of the Act, 42 U.S.C. § 7413(b) provides that the Administrator shall, in the case of a person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for injunctive relief and to assess and recover a civil penalty of up to $25,000 per day whenever such person violates Section 112(c) of the Act, 42 U.S.C. §7412(c).

20. Unless restrained, defendant will continue to violate 40 C.F.R. §§ 61.64(a)(3), 61.65(a), and the Act, which will result in irreparable harm to the public health and welfare.

WHEREFORE, plaintiff, the United States of America respectfully prays this Court for:

(a) A permanent injunction, restraining and preventing defendant Ethyl Corporation, from violating the NESHAP for vinyl chloride, including 40 C.F.R. §§ 61.64(a)(3), 61.65(a), and the Act, at its Baton Rouge plant and requiring defendant to take all necessary remedial measures as expeditiously as possible to prevent future violations;

(b) A permanent injunction requiring defendant to develop, prepare, and submit for EPA approval a continuing maintenance and operation program for its Baton Rouge plant to prevent future discharges of vinyl chloride in violation of the NESHAP for vinyl chloride, including 40 C.F.R. §§ 61.64(a)(3), 61.65(a), and the Act, which shall include but not be limited to the purchase of any necessary monitoring and/or containment equipment to prevent discharges of vinyl chloride, the development of a preventive inspection and maintenance plan for equipment in vinyl chloride service, a study of premature rupture disk failures and development of a program to eliminate such failures, an improved program for investigating and preventing relief valve discharges, the purchase of equipment and institution of procedures to ensure the ability to "shortstop," "kill" or control runaway reactions, and the issuance of written, publicized procedures for operators to prevent or ameliorate relief valve discharges and the establishment of frequent operator training sessions;

(c) A permanent injunction requiring defendant to implement the plan described in (b) above as expeditiously as possible upon EPA approval;

(d) An order imposing upon defendant civil penalties in the amount of $25,000 for each day within five years prior to the date of filing of the instant civil action on which defendant failed to meet the requirements of 40 C.F.R. §§ 61.64(a)(3) and/or 61.65 (a) in violation of 42 U.S.C. § 7412(c);

(e) An order awarding plaintiff the costs of this action; and

(f) Such other and further relief as this Court may deem appropriate.

Respectfully submitted,

CAROL E. DINKINS
Assistant Attorney General
Land and Natural Resources Division
LLOYD S. GUERCI
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-5403
STANFORD O. BARDWELL, JR.
United States Attorney
Baton Rouge, Louisiana

By: IAN F. HIPWELL
Assistant United States Attorney

OF COUNSEL:
Patrick Hudson, 6 ORC
U.S. Environmental Protection Agency
Office of Regional Counsel
First International Bldg.
1201 Elm St.
Dallas, Texas 75270

Please Serve:
Ethyl Corporation through its
agent for service of process
C.T. Corporation Systems
1300 Hibernia Bldg.
New Orleans, La. 70112

Notice of Right to Consent to Disposition of a Civil Case by a United States Magistrate

In accordance with the provisions of 28 U.S.C. 636 (c), you are hereby notified that upon the consent of all the parties in a civil case, a United States Magistrate of this district court may conduct any or all proceedings, including trial of the case and entry of a final judgment. Copies of appropriate consent forms are available from the Clerk of the court.

You should be aware that your decision to consent, or not to consent, to the disposition of your case before a United States Magistrate is entirely voluntary and should be communicated to the Clerk of the district court. Only if all the parties to the case consent to the reference to a Magistrate will either the judge or magistrate to whom the case has been assigned be informed of your decision. Neither a district judge nor a magistrate will attempt to persuade or induce any party to the reference of this case to a Magistrate.

APPENDIX D

In the United States District Court
for the Middle District of Louisiana

Civil Action No. 83-0120

Section A

United States of America,
Plaintiff,

v.

Ethyl Corporation,
Defendant.

Motion to Dismiss for Failure to
State a Claim Upon Which Relief Can be Granted

Ethyl Corporation, defendant herein, respectfully moves the Court to dismiss the complaint herein pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In support of its motion, Ethyl would show the Court the following:

1. The complaint of the government shows on its face that it seeks to enforce certain design, equipment, work practice or operational provisions of the National Emission Standard for Vinyl Chloride ("Emission Standards"), 40 C.F.R. § 61.64(a)(3) and § 61.65(a).

2. The foregoing Emission Standard was promulgated by the Administrator of the United States Environmental Protection Agency effective October 21, 1976.

3. The Emission Standard as promulgated, incorporates numerous design, equipment, work practice, and operational standards.

4. At the time the Emission Standard was promulgated, the Administrator was without authority to promulgate emission standards which included design, equipment, work practice and operational standards.

5. The design, equipment, work practice and operational portions of the Emission Standard, having been issued in the

absence of any statutory authority, are unenforceable as a matter of law.

Respectfully submitted,

F. WALTER CONRAD, JR.
MARTIN L. McGREGOR
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Attorneys for Defendant

Certificate of Service

I, Martin L. McGregor, do hereby cerfify that on this the 31st day of March, 1983, a copy of the foregoing Motion to Dismiss For Failure to State A Claim Upon Which Relief Can Be Granted as well as a copy of a proposed Order were served upon the following by placing copies of the same in the United States mail, postage prepaid, certified, return receipt requested:

Carol E. Dinkins
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Lloyd S. Guerci
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Stanford O. Bardwell, Jr.
United States Attorney
352 Florida Street
Baton Rouge, Louisiana 70801

Ian F. Hipwell
Assistant United States Attorney
352 Florida Street
Baton Rouge, Louisiana 70801

Patrick Hudson, 6 ORC
U.S. Environmental Protection Agency
Office of Regional Counsel
First International Bldg.
1201 Elm Street
Dallas, Texas 75270

MARTIN L. McGREGOR
Martin L. McGregor

D-4

In the United States District Court
For the Middle District of Louisiana

Civil Action No. 83-0120
Section A

United States of America,
Plaintiff,

v.

Ethyl Corporation,
Defendant.

Proposed Order

Pending before the Court is Defendant's Motion to Dismiss for Failure to State A Claim Upon Which Relief Can Be Granted. The Court having considered the motion and the memorandum in support and opposition thereto, the Court is of the opinion that the motion must be GRANTED. It is, therefore, ORDERED that Defendant's Motion to Dismiss for Failure to State A Claim Upon Which Relief Can Be Granted is hereby GRANTED, and Plaintiff's claims under the Clean Air Act of the United States are hereby DISMISSED with prejudice.

DONE AT BATON ROUGE, LOUISIANA THIS ____ DAY OF _____, 1983.

_____
UNITED STATES DISTRICT JUDGE

APPENDIX E

United States Code, Title 42:

§ 7412. National emission standards for hazardous air pollutants

(c) Prohibited acts; exemption

(1) After the effective date of any emission standard under this section —

> **(A)** no person may construct any new source or modify any existing source which, in the Administrator's judgment, will emit an air pollutant to which such standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and
>
> **(B)** no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source —
>
> > (i) such standard shall not apply until 90 days after its effective date, and
> >
> > (ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(2) The President may exempt any stationary source from compliance with paragraph (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is

required for reasons of national security. An exemption under this paragraph may be extended for one or more additional periods, each period not to exceed two years. The President shall make a report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as an emission standard for purposes of the provisions of this chapter (other than the provisions of this subsection).

(July 14, 1955, c. 360, Title I, § 112, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1685, and amended Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 109(d)(2), 110, Title IV, § 401(c), 91 Stat. 701, 703, 791; Nov. 9, 1978, Pub.L. 95-623, § 13(b), 92 Stat. 3458.)

Historical Note

Codification. Section was formerly classified to section 1857c-7 of this title.

1978 Amendment. Subsec. (e). Pub.L. 95-623 added par. (5).

1977 Amendment. Subsec. (c)(1). Pub.L. 95-95, § 401(c), substituted "causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness" for "may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness".

Subsec. (d)(1). Pub.L. 95-95, § 109(d)(2), struck out "(except with respect to stationary sources owned or operated by the United States)" following "implement and enforce such standards".

Subsec. (e). Pub.L. 95-95, § 110, added subsec. (e).

Effective Date of 1977 Amendment. Amendment by Pub.L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub.L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

United States Code, Title 42:

§ 7413. Federal enforcement procedures

(b) Violations by owners or operators of major stationary sources

The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person —

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement; or

(3) violates section 7411(e), section 7412(c), section 1857c-10(g) of this title (as in effect before August 7, 1977), subsection (d)(5) of this section (relating to coal

conversion), section 7624 of this title (relating to cost of certain vapor recovery), section 7419 of this title (relating to smelter orders), or any regulation under part B of this subchapter (relating to ozone); or

(4) fails or refuses to comply with any requirement of section 7414 of this title or subsection (d) of this section; or

(5) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

The Administrator may commence a civil action for recovery of any noncompliance penalty under section 7420 of this title or for recovery of any nonpayment penalty for which any person is liable under section 7420 of this title or for both. Any action under this subsection may be brought in the district court of the United States for the district in which the violation occurred or in which the defendant resides or has his principal place of business, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty and to collect any noncompliance penalty (and nonpayment penalty) owed under section 7420 of this title. In determining the amount of any civil penalty to be assessed under this subsection, the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.

United States Code, Title 42:

§ 7607. Administrative proceedings and judicial review

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if

such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

Code of Federal Regulations, Title 40:

§ 61.64 Emission standard for polyvinyl chloride plants.

An owner or operator of a polyvinyl chloride plant shall comply with the requirements of this section and § 61.65.

(a) *Reactor.* The following requirements apply to reactors:

* * *

(3) Manual vent valve discharge: Except for an emergency manual vent valve discharge, there is to be no discharge to the atmosphere from any manual vent valve on a polyvinyl chloride reactor in vinyl chloride service. An emergency manual vent valve discharge means a discharge to the atmosphere which could not have been avoided by taking measures to prevent the discharge. Within 10 days of any discharge to the atmosphere from any manual vent valve, the owner or operator of the source from which the discharge occurs shall submit to the Administrator a report in writing containing information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken

to prevent the discharge, and measures adopted to prevent future discharges.

Code of Federal Regulations, Title 40:

§ 61.65 Emission standard for ethylene dichloride, vinyl chloride and polyvinyl chloride plants.

An owner or operator of an ethylene dichloride, vinyl chloride, and/or polyvinyl chloride plant shall comply with the requirements of this section.

(a) *Relief valve discharge.* Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge. Within 10 days of any relief valve discharge, the owner or operator of the source from which the relief valve discharge occurs shall submit to the Administrator a report in writing containing information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges.

(2) (2)

Nos. 85-334 and 85-376

Supreme Court, U.S.
FILED
DEC 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FIRESTONE TIRE & RUBBER COMPANY AND OCCIDENTAL CHEMICAL CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ETHYL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
ANNE S. ALMY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether a defendant in a civil enforcement action can challenge the validity of an EPA regulation, even though Section 307(b)(2) of the Clean Air Act, 42 U.S.C. 7607(b)(2), precludes review of the validity of EPA regulations in enforcement proceedings.

2. If we assume that facial review of the validity of a regulation is permissible in an enforcement proceeding, whether the court of appeals correctly concluded that a regulation calling for no discharge of vinyl chloride from relief valves except in an unpreventable emergency is an emission standard within the meaning of Section 112(b) of the Clear Air Act, 42 U.S.C. 7412(b).

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In the Supreme Court of the United States

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 761 F.2d 1153. The decision of the district court in *United States* v. *Ethyl Corporation* (Pet. App. 24a-35a) is reported at 576 F. Supp. 80. The decision of the district court in *United States* v. *Occidental Chemical Corp.* (Pet. App. 12a-23a) is unreported.

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[1]Pet. App. references are to the petitioners' appendix in No. 85-334.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1985. The petition for a writ of certiorari in No. 85-334 was filed on August 28, 1985. The petition for a writ of certiorari in No. 85-376 was filed on August 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the 1970 amendments to the Clean Air Act (Pub. L. No. 91-604, 84 Stat. 1676 *et seq.)* Congress authorized the Administrator of the Environmental Protection Agency (EPA) to promulgate national emission standards for hazardous air pollutants. *§* 112(b)(1)(B), 42 U.S.C. 7412(b)(1)(B). Under the statute, the Administrator is to publish a list of hazardous air pollutants and to prescribe an emission standard for such pollutants. 42 U.S.C. 4712(b)(1)(B). An "emission standard" is a "quantitative 'level' to be attained by the use of 'techniques,' 'controls,' and technology.' " *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 286 (1978). Emission standards differ from "work practice standards," which prescribe techniques, controls, and technology to be used rather than establishing a quantitative emission level that must be attained. The Administrator is to "establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health." 42 U.S.C. 7412(b)(1)(B).[2]

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[2]In 1977 Congress amended Section 112 (42 U.S.C. 7412) to authorize the promulgation of work practice standards if "it is not feasible" to prescribe a numerical emission limitation because the hazardous pollutant cannot be emitted through a conveyance or cannot be measured. *§* 112(e)(1) and (2), 42 U.S.C. 7412(e)(1) and (2). The Section authorizes the Administrator to promulgate a "design, equipment, work practice or operational standard" if it is not feasible to prescribe or enforce a numerical emission limitation. 42 U.S.C. 7412(e)(1).

In 1970 Congress also provided for judicial review of the Administrator's action in promulgating emission standards for hazardous air pollutants. Section 307(b)(1), 42 U.S.C. 7607(b)(1), requires a petition for review "of action of the Administrator in promulgating * * * any emission standard" under Section 112(b)(1)(B) to be filed "only in the United States Court of Appeals for the District of Columbia" within 30 days of the Administrator's action.[3] Any action of the Administrator "with respect to which review could have been obtained" under Section 307(b)(1) is not subject to judicial review in "civil or criminal proceedings for enforcement." § 307(b)(2), 42 U.S.C. 7607(b)(2). Section 307(b)(2) is commonly known as the "preclusive review" provision of the Clean Air Act.

2. Vinyl chloride was listed as a hazardous air pollutant pursuant to Section 112(b)(1)(A) (42 U.S.C. 7412(b)(1)(A)) in December 1975. 40 Fed. Reg. 59477-59478 (1975). Evidence had accumulated in the early 1970s showing that vinyl chloride was associated with a rare form of liver cancer, liver angiosarcoma. The preamble to EPA's proposed rulemaking summarized the health data on vinyl chloride exposure. It stated that workers in vinyl chloride plants were shown to experience 3,000 times the risk of developing angiosarcoma as the general population and that animal studies showed angiosarcoma at exposure levels of 50 parts per million (ppm).[4] People living in the immediate vicinity of vinyl chloride plants in 1974 experienced "occasional peak exposure of as high as 33 ppm." 40

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[3]The 1977 amendments to the Clean Air Act enlarged the time in which review may be sought to 60 days. 42 U.S.C. 7607(b)(1).

[4]The Occupational Safety and Health Administration promulgated regulations governing worker exposure to vinyl chloride in 1974. See *Society of the Plastics Industry, Inc.* v. *OSHA*, 509 F.2d 1301 (2d Cir.), cert. denied, 421 U.S. 992 (1975).

Fed. Reg. 59523-59533 (1975). EPA therefore proposed standards for vinyl chloride emissions, including emissions from relief valves. See 40 Fed. Reg. 59536, 59545-59546 (1975). The proposed regulations provided for "no discharge to the atmosphere from any relief valve" except for an emergency. 40 Fed. Reg. 50545 (1975). The preamble to the proposed regulations explained that a "zero emission limit is being proposed for relief discharges which can be prevented." 40 Fed. Reg. 59539 (1975).

In response to the notice of proposed rulemaking, 24 vinyl chloride companies submitted comments, including petitioners Ethyl Corporation, Firestone Plastics Co., and the predecessor of Occidental Chemical Corporation. 41 Fed. Reg. 46560, 46561 (1976). Several industry comments were directed to the proposed relief valve regulations.[5] The final relief valve regulations were slightly modified versions of the proposed regulations. They provide that there be no discharges from automatic or manual relief valves "except for an emergency" discharge. The regulations define an emergency discharge as one that could not have been prevented "by taking measures to avoid the discharges." 40 C.F.R. 61.64(a)(3), 61.65(a). They also require companies to notify the EPA of relief valve discharges within 10 days of their occurrence. The final regulations were promulgated on October 21, 1976, and became applicable to existing sources on January 20, 1977. 41 Fed. Reg. 46560 (1976). See § 112(c)(1)(A), 42 U.S.C. 7412(c)(1)(A). No action challenging the final relief valve regulations was filed in the District of Columbia Circuit.

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[5]Petitioner Firestone argued that a negligence standard should be employed in determining whether relief valve discharges attributable to operator error were preventable. II Office of Waste Management, U.S. Environmental Protection Agency, *EPA-450/2-75-009b, Standard Support and Environmental Impact Statement,* at 2-47 (1976).

3. a. A civil enforcement action against the Ethyl Corporation was commenced in February 1983. The complaint sought civil penalties and an injunction to remedy repeated relief valve discharges of vinyl chloride from the company's facility at Baton Rouge, Louisiana. The complaint alleged 81 discharges from automatic relief valves, in violation of 40 C.F.R. 61.65(a), totalling 168,622.7 pounds of vinyl chloride between March 18, 1977, and April 30, 1982. It also charged the company with 17 discharges from manual relief valves, in violation of 40 C.F.R. 61.64(a)(3), totalling 14,596 pounds of vinyl chloride between July 14, 1978, and January 11, 1982. Pet. App. 25a. The complaint requested civil penalties and an injunction to require Ethyl Corporation to develop and implement a remedial program to prevent future vinyl chloride discharges.

In April 1983 Ethyl filed a motion to dismiss, claiming that the relief valve regulations constituted work practice standards which were unauthorized by the Clean Air Act when the regulations were promulgated in 1976. Accordingly, the company claimed that the regulations were unenforceable as a matter of law. The district court, relying on *Adamo Wrecking,* ruled that it had jurisdiction, despite the preclusive review provision, to determine whether the relief valve regulations were emission standards within the meaning of the Clean Air Act (Pet. App. 28a-29a). It then ruled that the relief valve regulations are work practice standards because the trial court, in an enforcement action, would have to inquire into the measures the company employed to avoid emergencies in order to determine whether there had been a violation. Accordingly, the district court declared the relief valve standards unenforceable and dismissed the case. Pet. App. 32a-35a.

b. A civil enforcement action against Occidental Chemical Corporation and Firestone Tire and Rubber Company was commenced in July 1983 (Pet. App. 13a). Occidental

owns and operates a polyvinyl chloride plant in Addis, West Baton Rouge Parish, Louisiana. It purchased this plant in November 1980 from Firestone Tire and Rubber Company, which owned and operated the plant prior to that date. The complaint alleged that Firestone discharged a total of approximately 5,011 pounds of vinyl chloride from relief valves, in violation of 40 C.F.R. 61.65(a), in 21 episodes between March and October of 1980. It further alleged that Occidental discharged a total of 2,120 pounds of vinyl chloride on nine occasions between January 1981 and February 1982. In addition, the complaint charged that Firestone, on all 21 occasions, and Occidental, on two occasions, failed to report relief valve discharges in the 10-day period specified in 40 C.F.R. 61.65(a).

Firestone and Occidental filed motions to dismiss the complaint based upon the district court's decision in the *Ethyl* case. In response, the government filed a motion to stay proceedings pending the outcome of its appeal in the *Ethyl* case. The district court denied the stay motion, and dismissed the action without issuing an opinion. Pet. App. 22a-23a.

4. The court of appeals consolidated the two cases and reversed. The court ruled that Section 307(b)(2) on its face divested the district court of jurisdiction over petitioners' challenge to the relief valve regulations (Pet. App. 5a). It further ruled that this Court's decision in *Adamo Wrecking* is limited to criminal prosecutions, so that the Court's holding that a district court in a criminal enforcement action may determine whether or not the regulation that the defendant allegedly violated is on its face an "emission standard" does not extend to these civil enforcements actions (Pet. App. 5a-9a).[6] The court of appeals also found

[6]The court noted that the companies had not invoked considerations of due process to escape the preclusive effect of Section 307(b)(2) and that they probably lacked standing to do so since they all participated in the rulemaking proceedings in 1976 (Pet. App. 8a-9a n.8).

that if *Adamo Wrecking* applied so that a limited inquiry into the relief valve regulations was warranted, the regulations were on their face emission standards (Pet. App. 9a-10a).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.[7]

1. Petitioners' major submission is that the court of appeals erred in refusing to apply *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978), to these civil enforcement actions. In *Adamo Wrecking*, this Court held that a defendant in a criminal prosecution brought to enforce asbestos regulations promulgated under the Clean Air Act could raise the issue of "whether the regulation which the defendant is alleged to have violated is on its face an 'emission standard' " (434 U.S. at 285). The Court stressed that the reviewing court in such a case is to conduct a "narrow inquiry" (*ibid.*).[8]

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[7]Since the court of appeals reversed and remanded for trial, petitioners' contentions are not yet ripe for review. If petitioners prevail at their trials, their contentions will be moot. If, on the other hand, they are held liable for damages and those determinations are upheld on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. For this reason as well, review by this Court is unwarranted.

[8]The issue on the merits in this case differs substantially from that decided in *Adamo Wrecking*. In *Adamo Wrecking*, the government admitted that the contested regulation was a "work practice" standard. See Brief for the United States at 5, 28-29. The question considered by the Court, therefore, was whether a work practice standard constituted an emission standard within the meaning of the statute. In the present case, the government does not consider the vinyl chloride relief valve regulations to be "work practice" standards. Accordingly, petitioners' claims here required the courts to determine whether the relief valve

The short answer to petitioners' argument is that the court of appeals afforded the petitioners the inquiry mandated by *Adamo Wrecking* in criminal cases in reversing the district court. The court of appeals held that, to the extent a "limited inquiry is warranted" for jurisdictional purposes (Pet. App. 9a & n.9), it "had no trouble labeling the regulations as emission * * * standards" since they set "a 'no discharge' cap on the amount of vinyl chloride" that can be emitted (*id.* at 10a). The court's resolution of this question—that the regulations are emission standards rather than work practice standards—is in conformity with the decisions of all the other lower federal courts (excluding the district court here) that have considered the matter. *United States* v. *Borden, Inc.*, 572 F. Supp. 684 (D. Mass. 1983); *United States* v. *Conoco, Inc.*, No. 83-1916-E (W.D. Okla. Jan. 23, 1984); *United States* v. *B.F. Goodrich Co.*, 609 F. Supp. 1 (W.D. Ky. 1984). Thus, if a federal court must review the facial validity of a regulation in a civil enforcement action under the Clean Air Act, that review was afforded petitioners by the Fifth Circuit, which held, in conformity with the decisions of three district courts, that the relief valve regulations are emission standards.[9]

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regulations should be interpreted as "work practice" standards contrary to the interpretation of the Administrator. In such circumstances, the interpretation of the Administrator is normally entitled to deference. See, *e.g.*, *Chemical Manufacturers Ass'n* v. *NRDC*, No. 83-1013 (Feb. 17, 1985), slip op. 9-10; *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-6.

[9]Moreover, because this interpretation helps to effectuate the purposes of the Act, it has properly been adopted by the courts. As this Court explained in resolving a similar definitional question under the Federal Food, Drug, and Cosmetic Act, "the 'natural way' to draw the line 'is in light of the statutory purpose.' " *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969), quoting *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 124-125 (1953).

As Firestone's submission demonstrates (Pet. 11-14), petitioners seek far more than facial review of the vinyl chloride relief valve regulations. Firestone submits enforcement memoranda as evidence that the regulations should be interpreted as work practice standards (*id.* at 11-12), and relies upon the injunctive relief sought in the complaints to show that measures were necessary to comply with the regulations (*id.* at 13). Such evidence, of course, is irrelevant to the "facial inquiry" petitioners purport to seek. More significantly, use of such materials could convert any Clean Air Act regulation into a work practice standard. All emission standards require measures—installation of equipment or changes in operating procedures—for their attainment. An individualized study of the measures taken by a polluter and the possible additional procedures and equipment available to reduce emissions is relevant to the decision to take enforcement action and to the formulation of the appropriate form of injunctive relief to request.[10] If consideration of such matters shows that the regulation sought to be enforced is a "work practice standard," then many Clean Air Act regulations promulgated before 1977 may be subject to invalidation.

In short, the court of appeals afforded petitioners the limited inquiry into the facial validity of the relief valve regulations that they purport to seek. Moreover, since the 1977 amendments to the Clean Air Act, the Administrator

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[10]For example, in *United States* v. *West Penn Power Co.*, 460 F. Supp. 1305, 1307 (W.D. Pa. 1978), the United States brought action to enforce a requirement that a power plant not "emit sulfur dioxide in excess of .6 pounds per million BTU." The relief requested by the United States was an order directing that a flue gas desulferization system be installed (*id.* at 1307-1308), and such an order was entered by the district court (*id.* at 1319). Cf. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 318 (1982) (creation of compliance orders under the Clean Water Act).

has been authorized to promulgate work practice standards. See note 2, *supra*. Hence, the distinction between emission standards and work practice standards is of limited significance for the future. As a result, there is no substantial reason for this Court to review the universal conclusion that the vinyl chloride relief valve regulations are valid on their face as emission standards.[11]

2. In addition, it is not clear that even a facial inquiry is appropriate in a civil enforcement action. This Court rested its holding *Adamo Wrecking* on the "stringent sanctions," including imprisonment, which may be imposed for criminal violations of the Clean Air Act (434 U.S. at 283). The Court stressed that Congress had created a number of special rules regarding criminal liability under the Act and that it has "imposed *civil* liability for a wider range of violations of the orders of the Administrator than those for which it has imposed *criminal* liability" (*id.* at 282 (emphasis in original)). Moreover, invoking the rule of lenity, a standard of statutory construction used only in criminal cases, this Court ruled that, if there were doubts, they were to be "resolved in favor of the defendant" (*id.* at 285 (citation omitted)).

As the court of appeals concluded, "the Court rested its holding in *Adamo Wrecking* on the nature of a criminal prosecution" and its rationales are not "applicable in the context of civil proceedings" (Pet. App. 6a-7a). In contrast to the rule of lenity, deference is to be afforded the interpretations of the Administrator concerning EPA's statutes and

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[11]Ethyl attacks (Pet. 14-15) the court of appeals' footnote (Pet. App. 8a-9a n.8) suggesting that the petitioners would probably lack standing to raise a due process claim because they commented on the regulations at the time of their promulgation. Ethyl's contention that the court's footnote creates a constitutional problem under the equal protection component of the Due Process Clause is without merit since petitioners never raised a due process claim below.

regulations in civil actions. *Train* v. *NRDC*, 421 U.S. 60, 75 (1975); see *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). As the Court noted in *Adamo Wrecking*, Congress imposed civil liability for a wide variety of violations of the Act. And, of course, imprisonment cannot be imposed in a civil enforcement action.

Petitioners argue that criminal standards should be applied to these civil enforcement actions because they are indistinguishable from criminal actions. Petitioner Firestone claims (Pet. 7) that there is no meaningful difference between civil and criminal proceedings under the Clean Air Act because the maximum daily penalty or fine specified in Act, $25,000 a day, is the same under both civil and criminal enforcement provisions. § 113(b) and (c)(1), 42 U.S.C. 7413(b) and (c)(1). The civil enforcement provision, however, clearly empowers the Administrator to seek injunctions as well as to recover civil penalties (§ 113(b)), while the criminal provisions state that a knowing violator may "be punished by a fine * * * or by imprisonment for not more than one year, or by both" for a first offense (§ 113(c)(1)). Thus, there are significant differences.

Petitioner Ethyl (Pet. 7-8) contends that the civil actions should be analogized to criminal proceedings because the civil penalties sought are "penal" in nature. Petitioner ignores that the complaints filed by the government requested injunctive relief as well as civil penalties. Injunctive relief, of course, is addressed to the federal court sitting in equity and is entirely civil in nature. See *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311-312 (1982). Moreover, analysis of the civil penalty provision of Section 113(b) compels the conclusion that it is not primarily punitive, see

United States v. *Ward*, 448 U.S. 242, 254 (1980), and has been administered to effectuate compensatory objectives.[12]

Petitioners also assert that, even if the present enforcement actions are found to be entirely civil in character, *Adamo Wrecking* and Section 307(b)(2) should be read to afford civil defendants the right to challenge the facial validity of the Administrator's regulations because federal statutes should be given the same construction in both civil and criminal applications. Petitioners rely primarily upon *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954) (85-334 Pet. 7-9; 85-376 Pet. 8), in making this argument. In that case the Court held that the phrase "any lottery, gift enterprise, or similar scheme" did not mean one thing in a criminal prosecution under 18 U.S.C. 1304 and something else in FCC regulations prohibiting violations of Section 1304 by broadcasters. 347 U.S. at 296 n.18. Nothing in the Court's opinion suggests that a facial inquiry into whether a regulation is an emission standard is required in both civil and criminal enforcement actions.[13]

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[12]The EPA Civil Penalty Policy calculates penalties within the statutory maximum by evaluation, inter alia, of the environmental damage involved, the economic benefit enjoyed by the violator through its noncompliance, and extraordinary enforcement costs incurred. See *EPA Civil Penalty Policy*, 8 Env't Rep. (BNA) 2011, 1012 (1978); see also 15 Env't Rep. (BNA) 885 (1984).

[13]Firestone notes (Pet. 8) that the Court stated that the construction of Section 1304 urged by the FCC "would likewise apply in criminal cases," contrary to the "well-established principle that penal statutes are to be construed strictly" (347 U.S. at 296). This case is obviously different since we are not suggesting that a facial inquiry into whether a particular regulation is an emission standard is not required in criminal cases; *Adamo Wrecking* forecloses such an argument. It does not follow from *FCC* v. *American Broadcasting Co.*, *supra*, that a similar inquiry must be available in civil cases. That decision at most suggests a need for similarity of substantive statutory interpretation when the substantive issue is properly raised.

Accordingly, the court of appeals was entirely correct in holding that a facial inquiry into whether the vinyl chloride regulations are emission standards is not required in these civil enforcement cases. Having failed to raise the issue in challenging the regulations following their promulgation, petitioners are now precluded by Section 307(b)(2) from litigating the issue in civil enforcement proceedings. Moreover, this case is the first court of appeals decision concerning whether *Adamo Wrecking* applies to a civil enforcement proceeding pursuant to Section 113(b) of the Clean Air Act.[14] There will be an opportunity for this Court to review this question should there be a decision by another court of appeals in the future that conflicts with the court of appeals' decision in this case. Moreover, in the present case, the court of appeals, as an alternative ground for its decision, afforded petitioners *Adamo Wrecking*-type review and, as we have shown, its holding rejecting their claim on the merits does not warrant this Court's review. There is, accordingly, no occasion here for review of the *Adamo Wrecking* issue.

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[14]Contrary to petitioners' claims (85-334 Pet. 9; 85-376 Pet. 10), *Hooker Chemical Co.* v. *United States*, 642 F.2d 48 (3d Cir. 1981), is not in conflict with the court of appeals' decision. *Hooker Chemical Co.* was a Section 307(b)(1) challenge to an EPA order—not an enforcement proceeding—and the court's statements concerning *Adamo Wrecking* were mere dicta. See also *Luckie* v. *EPA*, 752 F.2d 454, 456-457 (9th Cir. 1985) (*Adamo Wrecking* is "inapplicable" in citizens suit under Section 304 (42 U.S.C. 7604) of the Act because "no criminal charges" are involved).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
ANNE S. ALMY
Attorneys

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